92-293

Supreme Court, U.S.
FILED
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No. 92-

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Petitioners,

- against -

BARBARA KRAEBEL d/b/a BARKLEE REALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 11, 1992

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QUESTIONS PRESENTED

1. When a plaintiff claims a denial of procedural due process not because the process allegedly was inadequate, but rather simply because the agency allegedly took too long to act on his or her application, is predeprivation process impossible so that, under *Parratt v. Taylor*, 451 US 527 (1981), and *Zinermon v. Burch*, 494 US 113 (1990), the State meets the requirements of procedural due process by making available the remedies of mandamus to compel the agency to act and money damages for any unconstitutional delay?

2. If *Parratt* and *Zinermon* do not apply to such a claim, did respondent state a claim upon which relief may be granted, for denial of procedural due process because of administrative delay, where she merely alleged a chronology of events and then simply asserted that the delay is "unreasonably long" and the forms she must file are "unnecessarily complex"?

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- against -

BARBARA KRAEBEL d/b/a BARKLEE REALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The Court of Appeals held that respondent's procedural due process claim, that petitioners simply took too long to act on her application, was not barred by *Parratt v. Taylor*, 451 US 527 (1981), because respondent challenges an established state procedure and not a random and unauthorized departure from an established procedure. The Court of Appeals also held whether the delay here was so great as to violate respondent's due process rights could not be determined from the amended complaint and that petitioners' motion to dismiss the due process claim for failure to state a claim upon which relief may be granted therefore should be denied.

The decision of the Court of Appeals is reported at 959 F2d 395 (2d Cir, 1992). The decision of the District Court is not reported.

JURISDICTION

The District Court dismissed the amended complaint by judgment entered May 29, 1991 (App. 46-47). The Court of Appeals issued its judgment on March 19, 1992 (App. 28-29). Petitioners filed a motion for rehearing on April 3, 1992, one day late, and were granted leave to file that motion one day late by order dated April 14, 1992 (App. 50). The petition for rehearing was denied on May 18, 1992 (48-49), and this petition is timely filed, Rules of the Supreme Court of the United States, Rules 13.1, 13.4. This Court has jurisdiction under 28 USC § 1254(1) and Rule 10.1(c) of the Rules of this Court.

RELEVANT STATUTES AND REGULATIONS

New York Real Property Tax Law § 467-b (App. 104-14); New York City Administrative Code §§ 26-405[m], 26-406 & 26-509 (App. 77-103).

STATEMENT OF THE CASE

Respondent owns and manages a 16-unit apartment building in Manhattan (App. 53). As relevant here, the amended complaint challenges New York City's Senior Citizen Rent Increase Exemption ("SCRIE") program. Under this program, eligible senior citizens may receive exemptions from rent increases. These exemptions are equal to the amount by which the rent otherwise to be paid

by the senior citizen in question would exceed one-third of his or h ncome.

When a senior citizen is awarded a SCRIE exemption, the landlord receives a certificate showing the amount of the exemption. The landlord then submits the certificate and other documentation to petitioners and the landlord, in tur receives a real estate tax credit equal to the exemption. t the landlord's option, the landlord may receive cash or apply the credit to real estate taxes. The landlord ceives cash if the credit is greater than the landlord's real estate taxes, in which case the cash payment generally is referred to as 'excess SCRIE." NY Real Property Tax Law § 467-b; NYC Admin. Code §§ 26-405[m], 26-406 & 26-509 (App. 77-114).

Only excess SCRIE is relevant here. The amended complaint alleges as follows. Respondent had four SCRIE tenants in 1988 (App. 54). Her application for excess SCRIE for that year was returned because she had not su tted all required documentation (App. 54). After o ng e necessary documents from petitioner New Y City Department of Housing Preservation and Development ("HPD"), respondent reapplied in May 1989 for her 1988 excess SCRIE (App. 54). As of July 6, 1990, the date of the amended complaint, respondent had not received a response to her application for excess SCRIE for 1988 (App. 55, 75).

The amended complaint also alleges that respondent had four SCRIE tenants in 1989 and that she applied for excess SCRIE for that year in May of 1990 (App. 55). As of July 6, 1990, the date of the amended complaint,

respondent had not received a response to her application for excess SCRIE for 1989 (App. 56, 75). Respondent had four SCRIE tenants in 1990 but as of July 6, 1990, the date of the amended complaint, she had "been able to collect only $705.50 of the $2,331.36 owing under the SCRIE Program for the Property" for the period January through June, 1990 (App. 57). This allegedly was so because HPD had not issued to her some of the documents necessary for her SCRIE application and because respondent "will rely entirely on Excess SCRIE payments for all rents under the SCRIE Program" (and could not apply for excess SCRIE until that period had ended) (App. 57).

The amended complaint also charges that the forms that respondent must file under the SCRIE program are "unnecessarily complex and require [her] to spend excessive amounts of time collecting the rent for SCRIE Tenants and paying the real estate taxes on the Property" (App. 58). Specifically, respondent asserts, the form that must be filed with each quarterly real estate tax payment requires her "to assemble detailed information and to complete, notarize and mail forms as well as to pay the tax balance by check" (App. 58). Respondent also asserts that the form that must be filed annually for excess SCRIE requires that she "assemble detailed information, attach voluminous supporting documentation, complete, notarize and mail the application, and be subject to audit by [petitioners] with respect thereto" (App. 58). The supporting documentation for respondent's 1988 and 1989 excess SCRIE applications was 35 and 30 pages, respectively (App. 59). Respondent also charges that petitioners already have in their files virtually all the information and supporting documentation required (App. 59).

Respondent further alleges, upon information and belief, that petitioners "have assigned inadequate staff to process SCRIE documentation and applications for Excess SCRIE and have failed to allocate sufficient funds from the City budget to pay all claims for Excess SCRIE as they are received" (App. 60).

The District Court dismissed the amended complaint in its entirety under Fed. R. Civ. P. 12(b)(1) & (6), holding in relevant part that respondent's due process challenge to the SCRIE program was barred by the doctrine of *Parratt v. Taylor*, 451 US 527 (1981), because, even assuming that respondent had pled a denial of a protected property interest, "the [State court] review of administrative actions under New York CPLR Article 78 satisfied his [sic] right to due process" (App. 40-42). For that proposition the District Court cited three cases in which the Second Circuit Court of Appeals had both found *Parratt* applicable and held that an Article 78 proceeding was an adequate postdeprivation remedy under *Parratt* (App. 41 n.12).

The Court of Appeals reinstated respondent's claim that her federal due process rights allegedly were violated by the delay in issuing her excess SCRIE (App. 20-27). The Court of Appeals held that respondent's claim did not come within the *Parratt* rule because respondent does not challenge a random, unauthorized act but rather "established state procedures that cause the delays and burdens which deprive her of her property," citing *Logan v. Zimmerman Brush Co.*, 455 US 422, 436 (1982) (App. 20-21).

On the merits, the Court of Appeals stated (App. 24):

> While we recognize that "[r]egrettably, delay is a natural concomitant of our administrative bureaucracy," *Isaacs [v. Bowen]*, 865 F2d [468] at 477 [(2d Cir. 1989)], we are not prepared to conclude, without further evidence, that the delays here are reasonable. Although no bright-line rule exists for determining when a delay is so burdensome as to become unconstitutional, we think that there is a least a question of fact as to whether these delays were egregious and without any rational justification. Given the case-by-case approach required in due process cases, *see [Mathews v.] Eldridge*, 424 US [319] at 344 [(1976)], the issue must be determined on a full evaluation of all the circumstances.

The Court of Appeals directed the District Court, on remand, to determine whether the burdens and delays imposed by petitioners were reasonable (App. 25-27). The Court of Appeals directed the District Court to bear in mind "the deference appropriately accorded by courts to executive agencies regarding practicalities encountered by those agencies in administering legislative programs" and to consider the following factors (App. 26-27) (citation omitted):

> [T]he procedures actually used by [petitioners] to determine whether a landlord is entitled to the claimed excess SCRIE payments, the facts

> [petitioners] consider[], the level of difficulty in making the determination, the amount of work required, the amount of decision-making discretion given to the employees, the need for and availability of administrative appellate review, the necessity for the paperwork and supporting documentation required, the amount of time required to process similar claims, and any other factors that may bear on whether "due process" is provided.

Petitioners petitioned for rehearing, arguing that under *Zinermon v. Burch*, 494 US 113 (1990), the Court of Appeals should have focused on the question of whether predeprivation process was possible and not on whether the allegedly unconstitutional delay was the result of an established state procedure. Petitioners argued that predeprivation process was not possible here because there is no way of knowing when the delay on each of the thousands of applications pending with City agencies at any time is about to pass from the constitutional to the unconstitutional. The Court of Appeals denied the petition without opinion (App. 48-49).

DISTRICT COURT JURISDICTION

The District Court has jurisdiction under 28 USC §§ 1331 and 1343 (*see* App. 52 [amended complaint]).

REASONS TO GRANT WRIT

The Court of Appeals' ruling here will open the floodgates and drown the District Courts with section 1983

cases brought by every person who believes that a federal, state, county, city, town or village agency, or public authority, has taken too long to process an application. Although some of these plaintiffs may come to Court too early, and their complaints may be dismissed for failure to state a claim upon which relief may be granted, many of these cases may require exactly what the Court of Appeals has directed the District Court to do here: supervise discovery and then sit in judgment on numerous agency practices in order to determine whether the delay attributable to those practices is reasonable. Under the Court of Appeals' analysis, the fact that State law provides for a judicial remedy in the form of mandamus directing the agency to act, and even money damages for any unconstitutional delay, would be entirely irrelevant.

Unfortunately, it is reasonable to expect that a consequence of recent government cutbacks on the federal, state and local level will be an increase in the length of time agencies require to process applications and render determinations. This being so, the number of cases in which plaintiffs claim that their due process rights were violated by delay alone certainly will increase, and probably substantially. In addition to the Court of Appeals' holding on *Parratt*, the lure of attorneys' fees under section 1988 of title 42 will be a further guarantee that these suits will be heard in federal Court.

(1)

This Court has recognized that at some point a delay in governmental action can become so great as to violate

procedural due process. *Loudermill v. Cleveland Board of Education*, 470 US 532, 547 (1985); *Barry v. Barchi*, 443 US 55, 66 (1979). In neither of these cases, however, did the government raise the *Parratt* issue.

Parratt v. Taylor, *supra*, 451 US 527, and the succeeding cases *Logan v. Zimmerman Brush Co.*, 455 US 422 (1982), and *Hudson v. Palmer*, 468 US 517 (1984), established that there is no denial of procedural due process when the deprivation is the result not of established state procedures, but rather of a random and unauthorized departure from those procedures, and State law provid n adequate post.eprivation r y. In *Zinermon v. Bu h*, 494 US 113 (1990), the pl ff alleged that there was a flaw in Florida's established state rocedures for the admission of me tal patients becaus although patients could be dmitted as voluntary patients only if they gave informe consent to admission, Florida law had no procedure design to ensure that those v sought admission volu ry patients were competen o consent to admissi ... Elaborating on the meaning of the phrase "random and unauthorized departure," this Court held that the plaintiff had stated a claim for denial of procedural due process because: (1) the risk of an err eous deprivation, in that case the risk that a person would sign the forms for voluntary admission although he or she was not competent to consent to admission, was predictable; (2) the persons who effected the deprivation were authorized to effect the depri ion ., to admit pat nts; and (3) predeprivation proc , f xample a hearing on competence, was possible. US at 136-38.

For purposes of the present case,[1] *Zinermon* clarifies the difference between "established state procedures" and a "random and unauthorized departure" from those procedures. The persons charged with acting on respondent's excess SCRIE application are not authorized to effect the deprivation that took place, *i.e.*, a delay so long that a denial of procedural due process occurs. The deprivation is not predictable, as petitioners have no way of knowing when the length of time that each of the pending applications has been pending is about to become so great that the applicant is about to be denied procedural due process. And predeprivation process is not possible, in that it is not realistic to require the State periodically to hold a hearing on the question of whether the length of time each application has been pending is about to become so great as

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[1] *Zinermon* was a 5-4 decision. The dissent argued that the plaintiff had pled a random and unauthorized departure from the statutory requirements, 494 US at 140-41 (O'Connor, J. dissenting), and that, in any event, there was no flaw in Florida's statutory procedures because the statute plainly provided that if a person could not give informed consent that person must be treated as an involuntary patient, *id.* at 140 (O'Connor, J., dissenting). The dissent also disagreed with the majority's analysis that Florida had delegated to the admissions personnel the responsibility to see that patients received procedural due process in the admission process and that, as a result, Florida should be liable for their failure to do so in any given case. *Id.* at 145-50 (O'Connor, J., dissenting). That conclusion of the majority, however, is not relevant to the present case. For present purposes, the dissent was in essential agreement with the majority that *Parratt* will apply when the State cannot predict in advance when the deprivation will occur, and thus cannot provide predeprivation process, and those who effect the deprivation are not authorized to effect the deprivation at issue. 494 US at 141-44, 146 (O'Connor, J., dissenting).

to deny the applicant due process.

On the subject of whether New York law provides an adequate postdeprivation remedy for the deprivation respondent alleges here, at present let it suffice to say that the Second Circuit Court of Appeals has held in numerous cases, in which it has applied *Parratt*, that an "Article 78" proceeding in the New York Courts is an adequate postdeprivation remedy. *E.g.*, *Katz v. Klehammer*, 902 F2d 204, 206-07 (2d Cir, 1990); *Campo v. New York City Employees' Retirement System*, 843 F2d 96, 100-03 (2d Cir), *cert. denied*, 488 US 889 (1988); *Eastway Construction Corp. v. City of New York*, 762 F2d 243, 250 (2d Cir, 1985), *cert. denied*, 484 US 918 (1987); *Giglio v. Dunn*, 732 F2d 1133, 1135 (2d Cir), *cert. denied*, 469 US 932 (1984). In an Article 78 proceeding respondent could obtain a judgment in the nature of mandamus directing petitioners to act on her application and awarding her damages under the due process clause for any unconstitutional delay. NY CPLR § 7803[1] (mandamus available in Article 78 proceeding); *Katz v. Klehammer*, *supra*, 902 F2d at 207 (same); *Gross v. Perales*, 72 NY2d 231, 235, 532 NY Supp 2d 68, 70 (1988) (damages may be recovered in Article 78 proceeding where incidental to primary relief of mandamus); *Colton v. Riccobono*, 67 NY2d 571, 575-76, 505 NY Supp 2d 581, 583-84 (1986) (proper to raise in Article 78 proceeding plaintiff's claim that statute and court rule violated procedural due process by delaying trial of her action); *Bonnano v. Town Board*, 148 AD2d 532, 532-33, 538 NY Supp 2d 864, 864-65 (2d Dept, 1989) ordering town to act on application for plumber's license where delay had become unreasonable).

Respondent also could obtain her excess SCRIE benefits in a plenary action for money had and received. *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F2d 112, 125 (2d Cir, 1984); *Parsa v. State*, 64 NY2d 143, 485 NY Supp 2d 27 (1984).

(2)

This petition should be granted even if this Court agrees with the Court of Appeals that *Parratt* does not apply here. The floodgates also will be opened by the Court of Appeals' holding that the delay here might prove, upon examination of all the facts and circumstances, to be so lengthy as to violate due process, when all that respondent has set forth in the amended complaint is a chronology of events and the conclusion that the delay was too long. The Court of Appeals' holding also is in direct conflict with a decision of this Court.

Respondent's amended complaint simply relates the events in chronological order and alleges that petitioners' failure to act on her excess SCRIE application by the date of the amended complaint violated her rights to procedural due process. This Court held that a similar complaint, involving a nine-month delay, failed to state a claim upon which relief may be granted because that complaint "reveal[ed] nothing about the delay except that it stemmed in part from the thoroughness of the procedures" and included "no indication that [the plaintiff's] wait was unreasonably prolonged other than the fact that it took nine months." *Loudermill v. Cleveland Board of Education, supra*, 470 US at 547. This Court stated, "The chronology

of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation." *Id.* (footnote omitted).

As set forth above, the delay here was from May of 1989, when respondent submitted her application, to July of 1990, the date of the amended complaint (App. 55, 75). But applications for excess SCRIE contain a great deal of numbers and petitioners must verify the numbers and other information on the applications. The purpose of this verification is to discover mistakes and fraud that would lead to improperly inflated payments to landlords. Prevention of such mistakes and fraud obviously is a governmental interest of the highest order. We respectfully submit that the Court of Appeals' ruling that the fourteen-month delay here may violate the due process clause not only is erroneous in light of *Loudermill* but also will encourage every person who has been awaiting

governmental action for fourteen months or more to run to federal court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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City of New York,
Attorney for Petitioners.

LEONARD KOERNER,*
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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DECISION AND JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 444--August Term 1991
(Argued: November 20, 1991
Decided: March 19, 1992)
Docket No. 91-7665

BARBARA KRAEBEL, d/b/a Barklee Realty Company,
Plaintiff-Appellant,

- against -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendant-Appellees.

Before:

PRATT, MAHONEY, and MCLAUGHLIN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Mary Johnson Lowe, Judge, dismissing all of plaintiff's constitutional claims brought pursuant to 42 U.S.C. § 1983 under Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

Affirmed in part; reversed and remanded in part.

BARBARA KRAEBEL, New York, NY, *Plaintiff-Appellant pro se.*

TIMOTHY J. O'SHAUGHNESSY, New York, NY (Victor A. Kovner, Corporation Counsel of the City of New York, Fay Leoussis, of Counsel), *for Defendant-Appellees.*

PRATT, *Circuit Judge*:

Plaintiff-appellant Barbara Kraebel, d/b/a Barklee Realty Company, appeals *pro se* from a judgment of the United States District Court for the Southern District of New York, Mary Johnson Lowe, Judge, dismissing her complaint against the New York City Department of Housing Preservation and Development and the New York City Department of Finance (together, "the city"). Kraebel, who is the owner and landlord of a sixteen-unit residential apartment building, brought this action under 42 U.S.C. § 1983 claiming that the city's improper administration of two municipal programs applicable to landlords violated her rights under the fifth and fourteenth amendments of the constitution as well as the contract clause. She sought relief in the form of damages, injunctions, and attorney's fees. The district court dismissed some of her claims under Fed.R.Civ.P. 12(b)(1) for the lack of subject matter jurisdiction and some under Fed.R.Civ.P.12(b)(6) for failure to state a claim upon which relief could be granted.

BACKGROUND

Barbara Kraebel participated in two housing programs administered by the City of New York.

A. *The J51 Program*

The first is the "J51" program, which provides for property tax benefits to landlords who rehabilitate their

residential buildings. N.Y. Real Prop. Tax Law § 489; N.Y. City Admin. Code § 11-243. The purpose of the program is to encourage landlords to improve their buildings by authorizing exemptions and abatements in property taxes, for certain enumerated projects, to offset any increases in the real property taxes on their properties that would otherwise result from the improvements. N.Y. Real Prop. Tax Law § 489(1)(a) & (2)(a). Under authority of N.Y. Real Prop. Tax Law § 489(4), the City of New York has determined that certain improvements to residential apartment buildings are worth encouraging, and to do so, it has provided significant public subsidies for private undertakings. See N.Y. City Admin. Code § 11-243. Landlords participate in the J51 program on a voluntary basis.

Relying on the incentives provided by the J51 program, Kraebel voluntarily made improvements to her apartment. She now claims that the city has defaulted on the promises that induced her to spend large sums of money she could not otherwise afford. Specifically, in the summer of 1988, Kraebel submitted two applications for tax exemptions and abatements based on the improvements she had made. Kraebel alleges that these applications were subjected to repetitive reviews by numerous people, several of whom demanded further documentation that was not even required under the extensive J51 regulations. She claims that the city's conduct amounts to harassment that resulted in unreasonably delayed processing of her applications.

In February 1990, over a year and a half after her applications, the city finally approved benefits in the form of a tax exemption and tax abatement totalling $4,800 rather than the $8,441 she had requested in her June application, and $18,200 of the $36,494 she had sought in her August application. Although it rejected almost half of the total for which she had applied, the city did not provide adequate reasons. Kraebel claims that these actions constitute grossly negligent, prejudicial, and fraudulent administration of the J51 program and violate her rights to due process and equal protection under the fifth and fourteenth amendments to the United States Constitution.

Kraebel also claims, though for the first time on appeal, that the J51 statutes themselves, which authorize denial of tax exemptions on the property if a landlord fails to submit a "no harassment" affidavit, constitute a bill of attainder in violation of Article I, Section 10, Clause 1 of the constitution.

B. *The SCRIE Program*

The second program is the Senior Citizens Rent Increase Exemption ("SCRIE") program, which exempts qualified senior citizens living in rent-controlled and rent-stabilized apartments from paying rent increases. Although many of the city's poor currently receive some housing aid through rent regulation, the state has determined that the elderly poor may receive an additional boost to ensure affordable housing. N.Y. Real Prop. Tax Law § 467-b.

Eligible senior citizens apply to the city for certificates that exempt them from paying rent increases. Rather than paying their full rent, senior citizens submit these certificates to their landlords along with the portion of the rent they must still pay. Section 467-b(6) authorizes reimbursement of landlords for the loss of the rent increases through dollar-for-dollar tax abatements. If the amount of the exempted rent increase exceeds a landlord's total real estate tax liability calculated on an annual basis, section 467-b(9) authorizes reimbursement of the balance of the contractual rent in the form of cash payments (commonly referred to as "excess SCRIE").

The City of New York has implemented this rent-exemption scheme by local law. N.Y. City Admin. Code §§ 26-405(m) *et seq.*, 26-406, and 26-509. Under this program, a senior citizen must apply to the city to obtain an order exempting him from the payment of a rent increase. This order sets forth the amount of the exemption, and also functions as a tax-abatement certificate for the landlord. If the total amount of the tax-abatement certificates given to the landlord exceeds the amount of the landlord's real estate tax liability the landlord may elect either to apply the balance to later real estate taxes until the balance is exhausted or to obtain cash reimbursement. To get the excess SCRIE payment, a landlord must complete an application and provide adequate supporting documentation to allow the city to verify that the landlord is entitled to the cash.

Because she had four eligible elderly tenants residing in her building during the years 1988 through 1990, Kraebel participated in the SCRIE program, but obviously not on a voluntary basis. Since her tenants were exempted from paying otherwise authorized rent increases, she could not, by law, collect from them the full amounts of their rent. If she wanted reimbursement for the unpaid portions of the rents, she had no choice but to accept part of her rent in the form of tax abatements and then apply to receive any excess SCRIE to which she may have been entitled. As for the SCRIE payment, she could apply only on an annual basis after the rental year and after it was determined that she was entitled to excess SCRIE. Even then, Kraebel claims, the extensive documentation and record-keeping requirements imposed by the city, along with the delays in processing her applications, unfairly deprived her of her reimbursement.

Specifically, she alleges that because of delays caused by the city, she could not obtain the forms necessary to apply for the 1988 excess SCRIE until May 1989, at which time she sought reimbursement for $986.90. For the same reasons, she could not apply for her 1989 excess SCRIE until May 1990, when she claimed reimbursement in the amount of $1,9191.57. Furthermore, none of her claims for either year had been processed as of July 1990, and to this day, she has yet to receive reimbursement for her lost rents.

Although the city has partially processed Kraebel's claims for 1988 and 1989, and does not contest the amounts she is claiming, it has demanded of her further documentation, relating to whether she is entitled at all to reimbursement, and Kraebel, because of this suit has not met the city's additional demands.

C. *Issues*

Kraebel claims in general that the unnecessarily complex and burdensome procedures required of her to apply for reimbursements to which she is entitled, combined with the unreasonable delays caused by the inefficient administration of the J51 and SCRIE programs, result in a deprivation of her constitutional rights. More specifically, she argues that the city's interference with the sanctity of her lease agreements violates the contract clause; that the city's deplorable administration of the J51 and SCRIE programs violates her due process and equal protection rights; and that the SCRIE program as administered constitutes a taking of her property without just compensation.

The district court did not accept any of Kraebel's claims. It dismissed Kraebel's J51 claims pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, finding that the J51 program constituted a real estate tax scheme whose administration was insulated from federal court challenge under the principles of comity embodied in the Tax Injunction Act, 28 U.S.C. § 1341. The district

court then dismissed her SCRIE claims pursuant to Fed.R.Civ.P. 12(b)(6), concluding that none of her constitutional claims was legally cognizable.

DISCUSSION

A. *J51 Program*

Kraebel challenges the city's administration of the J51 program as violative of her rights to equal protection and due process. However, because we agree that the district court properly dismissed Kraebel's J51 claims for lack of subject matter jurisdiction, we do not reach the merits of her constitutional claims.

1. *Jurisdiction*

The district court held that the principle of comity underlying the Tax Injunction Act, 28 U.S.C. § 1341, barred federal court jurisdiction over challenges to the administration of the J51 program.

The tax Injunction Act bars federal injunctive challenges to state tax laws in federal courts. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 105 (1981). It provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Its underlying principle of

comity also bars federal court consideration of a declaratory judgment action challenging the constitutionality of state tax laws. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297 (1943). More recently, in *Fair Assessment*, the Supreme Court held that the principle of comity extended as well to prohibit § 1983 claims for damages against the administration of a state tax scheme. *Fair Assessment*, 454 U.S. at 116. These bars to federal court jurisdiction essentially recognize "the imperative need of a State to administer its own fiscal operations." *Id.* at 110 (quotations and citations omitted).

Federal jurisdiction over challenges to state tax schemes is not precluded, however, if state remedies are inadequate. Just as there is no bar to injunctive actions if state remedies are not "plain, speedy and efficient", 28 U.S.C. § 1341, there is no bar to declaratory judgment or damage actions if state remedies are not "plain, adequate, and complete," *Fair Assessment*, 454 U.S. at 116, and the effect of these two standards is exactly the same. *Id.* at 116 n.8.

Thus, in order for the district court to have properly dismissed Kraebel's J51 claims, it must have concluded, first, that the J51 program constituted a tax assessment scheme subject to the Tax Injunction Act and the principle of comity, and second, that the state remedies available to Kraebel were adequate. We agree that both conclusions apply to this case.

We are not persuaded by Kraebel's argument that the J51 program is not a property tax scheme but is primarily a rent-subsidization program whose review in federal court would not interfere significantly with the state's taxing powers. The program provides landlords who rehabilitate their buildings with exemptions from and abatements to real property taxes. Part of the adjustment is carried out through reductions, or non-increases, in the tax assessments on the improved properties; part contemplates a direct credit against the property taxes otherwise payable. N.Y. Real Prop. Tax Law § 489. Clearly, then, the scheme focuses on the assessment and collection of real property taxes, with which federal courts may not interfere. The fact that the scheme may also have significant implications for housing policies does not remove it from the scope of state actions that are insulated from challenge in federal court.

We also reject Kraebel's second argument, that even if the J51 program is a tax scheme within the meaning of the Tax Injunction Act and the principle of comity, the state remedies available to her are not "adequate". In *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 431 (2d Cir. 1989) (hereinafter, "*LILCO*"), we reviewed the remedies available under New York State procedures to challenge real property tax assessments claimed to be improper, and concluded that they were, indeed, "adequate". Kraebel has presented nothing to persuade us to reject our *LILCO* analysis and conclusion. In short, under the Tax Injunction Act and its underlying principle of comity, we are left with no choice but to affirm the district court's

dismissal of Kraebel's J51 claims for lack of federal jurisdiction.

2. *Bill of Attainder Claim*

Kraebel raises for the first time on this appeal the claim that the city's requirement that all landlords seeking J51 benefits file a "no harassment" affidavit constitutes a bill of attainder in violation of Article I, Section 10, Clause 1 of the constitution. She claims that when the city finally divulged its reason for not paying her J51 benefits, that reason was her alleged failure to file a "no harassment" affidavit, which declares that she had not harassed any of her tenants during the prior five years. Kraebel argues that such a requirement deems property owners guilty of harassment without proof and inflicts a penalty by withholding payments without a trial. She also complains that the city does not publish this requirement in the J51 regulations distributed to J51 applicants by the city.

While her argument is interesting, we cannot entertain it on this appeal. We have repeatedly held that if an argument has not been raised before the district court, we will not consider it, *Grace Towers Tenants Ass'n v. Grace Housing Development Fund Co.*, 538 F.2d 491, 495 (2d Cir. 1976); *First Nat'l Bank of Cincinnati v. Pepper*, 454 F.2d 626, 635-36 (2d Cir. 1972), and we adhere to that holding here.

B. *SCRIE Program*

Although the issue is not raised by the city, we note preliminarily that Kraebel's challenge to the SCRIE program is not barred from federal court review. While the SCRIE program does involve property tax payments, it does so only as a means of reimbursing a landlord for rents lost from their housing of SCRIE-eligible tenants. The SCRIE program has no impact on tax assessments or on the property tax scheme in general. In this lawsuit, Kraebel disputes only the procedures for timing of the payments of her excess SCRIE reimbursements. Thus, there is no jurisdictional bar to Kraebel's SCRIE claims.

Looking to the merits, Kraebel makes several constitutional challenges to the city's administration of the SCRIE program. Her basic argument is that she is being denied the use of cash rental payments to which she is entitled. She claims that under the city's program, she is forced, first, to take tax credits rather than cash and then, after the credits satisfy her tax obligation and she is entitled to cash, that she must suffer great administrative burdens to file her excess SCRIE claims, and finally, wait an unreasonable length of time to receive a reimbursement that does not reflect the time value of her money. The crux of Kraebel's complaint is that the administrative burdens and delays result in compulsory interest-free loans to the city, which unfairly deprive her of her constitutional rights.

We first address Kraebel's claims under the equal protection, contract, and taking clauses. Because we conclude that these claims have no merit, we do not discuss them in great detail. We then consider her claim under the due process clause, and because we find that the district court erred by dismissing that claim, we reverse and remand for further consideration.

1. *Equal Protection Claim*

Kraebel argues that the city selectively discriminates against her in violation of her equal protection rights. She claims to be a member of a class that is invidiously discriminated against--the class of private owners of small buildings with SCRIE-eligible tenants--and that they are being singled out to bear an arbitrary and disproportionate amount of the public burden of subsidizing elderly tenants.

The district court rejected this claim, stating that a rent regulation that is rationally related to a legitimate governmental purpose does not offend the equal protection clause merely because it affects landlords with eligible tenants more than it does landlords without such tenants. It held that the SCRIE scheme served a legitimate governmental purpose by trying to protect elderly low-income tenants. Although the court agreed that the program's reimbursement scheme placed an additional burden on landlords with SCRIE-eligible tenants, it held that this additional burden was rationally related to the

program's purpose and to its need to reconcile the competing interests of tenants, landlords, and the public.

We agree. A statute that does not burden a suspect class or a fundamental interest will not be overturned "'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" *Pennell v City of San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). Her claims to the contrary notwithstanding, Kraebel is not a member of a suspect class, nor is she asserting the type of fundamental interest that traditionally requires stricter scrutiny. Thus, the district court correctly applied the rational basis test to evaluate this equal protection claim. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Since the burden placed on landlords with eligible tenants is rationally related to the legitimate purpose of aiding low-income senior citizens, Kraebel's equal protection claim must fail. Although the delay in processing a landlord's reimbursement requests may seem to be an irrational and unnecessary burden in achieving the state's goals, the equal protection clause is not an appropriate means for analyzing the reasonableness of the delay.

2. *Taking Claim*

Kraebel also argues that the delays and documentation requirements in the administration of the

SCRIE program constitute a taking of her property without just compensation in violation of the fifth amendment as applied to the states by the fourteenth. The heart of her argument is that the unnecessary delays in processing payment applications under the SCRIE program have the effect of illegally compelling her to make long-term interest-free loans to the city.

Relying on Supreme Court precedent that has consistently upheld rent regulation as a proper exercise of state and local government police powers, the district court dismissed this claim. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). The district court held that in view of the legitimate exercise of police powers in this case, neither the documentation requirements nor the delays, were so unreasonable or inordinate as to amount of a confiscation of her property by the city. *Cf. Pennell*, 485 U.S. at 13 (finding rent regulation scheme a "rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment").

We agree. It is well established that "the Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Pennell*, 485 U.S. at 9

(citations, quotations, and brackets omitted); *see also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, when the "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good", it is more difficult to find a taking. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Specifically, the Supreme Court has held that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440. *See also Florida Power Corp.*, 480 U.S. at 252 ("statutes regulating the economic relations of landlords and tenants are not *per se* takings"). Although Kraebel does suffer an economic injury, given the public interest served by the regulation in dispute and prior precedent that has regularly denied relief in similar circumstances, her taking claim must fail.

3. *Contract Clause Claim*

Kraebel next claims that her rights under the contract clause are impaired by the operation of the SCRIE program. She argues that the city impermissibly interferes into the landlord-tenant relationship by forcing her to forego prompt payment of monthly rents to which she would be entitled absent the regulation.

The district court did not agree. Citing *Ritzie v. City University of New York*, 703 F. Supp. 271, 277 (S.D.N.Y.

1989), it first held that the contract clause applied only to legislative acts and did not affect the actions of which Kraebel complained. The court then held that the facts alleged did not establish a substantial impairment of Kraebel's reasonable contractual expectations, because the housing industry had been the subject of substantial government involvement and regulation in the past, and Kraebel should not have been surprised by the SCRIE regulation.

We agree that the district court properly dismissed Kraebel's claim under the contract clause. Although the language of the contract clause appears to provide an unambiguous bar to state laws that impair the obligation of contract, it "does not operate to obliterate the police power of the States". *Allied Structural Steel Co. v. Spanaus*, 438 U.S. 234, 241 (1978). Thus, the contract clause "'does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public'". *Id.* (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)).

In order for the contract clause to retain some meaning, however, it does impose some limits on the state, even in the exercise of legitimate police powers. *Id.* at 242. To determine whether a contract clause violation exists, the threshold question is "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (quoting

Allied Structural Steel, 438 U.S. at 244). As the severity of impairment increases, so too does the level of scrutiny to which the legislation is subjected. *Id.* As a measure of contractual expectations, one factor to be considered in determining the extent of the impairment is "whether the industry the complaining party has entered has been regulated in the past." *Id.* The next question is whether the state has "a significant and legitimate public purpose behind the regulation". *Id.* Finally, we must consider "whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 412 (citations and quotations omitted) (brackets in original).

Applying these factors here, we note that Kraebel is involved in a heavily-regulated industry--rental of residential property in New York City--and cannot claim surprise that her relationships with certain tenants are affected by governmental action. Furthermore, because the city ultimately reimburses her to the extent that its regulations deny her of her expected rent payments, the impairment cannot be described as being substantial or severe for purposes of the contract clause. Even assuming that the delays and burdens imposed on Kraebel's receipt of payments can be characterized as severe, there is a legitimate state purpose for the SCRIE program, and on balance, we conclude that Kraebel does not have a cognizable contract clause claim.

4. *Due Process Claim*

Finally, we address Kraebel's due process claim. Kraebel contends here that she has a constitutionally-protected interest in the excess SCRIE payments due her and that the city is depriving her of this property interest without due process of law by imposing onerous requirements and excessive delays.

The district court dismissed Kraebel's due process claim without considering whether she had any property interest at stake; it simply concluded that even if she did, the remedies available under New York law, specifically Article 78 of New York Civil Practice Law & Rules, were sufficient to satisfy her right to due process.

On this point, we disagree with the district court's analysis and conclusion. Initially, we address the district court's determination that because Kraebel could address her claims in a state Article 78 proceeding, she had all the process she was due. It is well-established that § 1983 generally allows plaintiffs with federal or constitutional claims the right to sue in federal court without first resorting to state judicial remedies, *Monroe v. Pape*, 365 U.S. 167, 183 (1961), or state administrative remedies, *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982). Some confusion of these principles has resulted from the Supreme Court's decisions in *Parratt v. Taylor*, 451 U.S. 527, 543 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), which held that when a plaintiff claims a due

process violation based on the deprivation of a property interest by a random, unauthorized act, the "due process" required by the fourteenth amendment is satisfied by the availability at the state level of an adequate post-deprivation hearing. Thus, if the deprivation is caused by random, unauthorized state conduct and an adequate post-deprivation hearing is available, there is no denial of "due process", and therefore, no constitutional violation on which to base a § 1983 claim.

Kraebel's claim, however, does not come within the *Parratt/Hudson* rule, because it cannot be characterized as a challenge to a random, unauthorized act. Instead, she attacks established state procedures that cause the delays and burdens which deprive her of her property. As the Supreme Court has noted, where it is "the 'established state procedure' that destroys [plaintiff's] entitlement without according him proper procedural safeguards", the plaintiff is entitled to pursue a due process claim under § 1983. *Logan v. Zinmerman Brush Co.*, 455 U.S. 422, 436 (1982) ("it is the state system itself that destroys a complainant's property interest, by operation of law"). Thus, the district court erred in concluding that the mere availability of redress in state court satisfied Kraebel's right to due process.

Since Kraebel's due process claim is not barred by the availability of a state remedy, we must analyze more closely the claim which she advances. There are two questions in the due process inquiry: first, "Was she

deprived of a property interest?" And second, "If so, what process was due?"

"Property interests * * * are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law". *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). To have a property interest, a person must have "a legitimate claim of entitlement". *Roth*, 408 U.S. at 577.

Here, New York law provides that landlords with senior-citizen tenants who are exempt from rent increases are to be reimbursed for their loss in rental income. N.Y. Real Prop. Tax Law § 467-b; N.Y. City Admin. Code §§ 26-405(m) *et seq.* and 26-509. The amount to be reimbursed is initially credited against the landlord's real estate tax liability, but once that tax liability is satisfied, the excess amount may, at the landlord's option, be paid directly to the landlord. Since Kraebel is entitled by state law to receive those excess amounts, we conclude that she has a property interest in the excess SCRIE payments which she claims.

We are not persuaded by the city's attempt to characterize Kraebel's asserted property interest as simply a claim for prompt payment, for which the city claims state law does not provide. Although the crux of her due process claim focuses on prompt payment, her property interest is

defined as the right to payment in general. Of course, the state may require landlords to comply with application procedures, and these may necessitate some time for processing, but the question of the timing of that processing and payment relate not to her property right, which is determined by state law, but to the adequacy of the process she is receiving, which is determined by federal law. *See Loudermill*, 470 U.S. at 541 ("'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action'") (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (brackets in original).

We thus ask: Has Kraebel received "due process"? Kraebel's claim is somewhat unusual because it is not couched, as are many of the reported cases, in terms of whether she is entitled to a hearing before the termination of a benefit she has been receiving or before denial of a benefit to which she is only arguably entitled. Even in those situations, however, the administrative process that determines eligibility for benefits must comport with due process. *Goldberg v. Kelly*, 397 U.S. 254, 260-66 (1970). *See also Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 489-90 (3d Cir. 1980) (holding that "due process must attach to the process of determining ineligibility, whether at the outset or after receipt of benefits"). Thus, even before the state makes a definitive decision as to entitlement, the road to that determination must be paved by due process.

Moreover, due process requires that eligibility for a variety of benefits be processed within a reasonable time. "'[T]he possible length of wrongful deprivation * * * is an important factor in assessing the impact of official action on the private interests'". *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) (disability benefits) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)). In other words, "implicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time." *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) (Posner, J.) (disability benefits). Stated differently, delay in processing can become so unreasonable as to deny due process. *See, e.g., Loudermill*, 470 U.S. at 547 (continued employment); *Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (Medicare benefits); *Kelly*, 625 F.2d at 490 (disability benefits).

While we recognize that "[r]egrettably, delay is a natural concomitant of our administrative bureaucracy," *Isaacs*, 865 F.2d at 477, we are not prepared to conclude, without further evidence, that the delays here are reasonable. Although no bright-line rule exists for determining when a delay is so burdensome as to become unconstitutional, we think that there is at least a question of fact as to whether these delays were egregious and without any rational justification. Given the case-by-case approach required in due process cases, *see Eldridge*, 424 U.S. at 344, the issue must be determined on a full evaluation of all the circumstances.

In evaluating Kraebel's due process claim on remand, the district court should keep in mind two very important considerations that make this case unusual. First, Kraebel is not merely seeking a hearing before she is being deprived of a benefit. Such an administrative hearing is not necessary, because according to her complaint, she is clearly and indisputably entitled by state law to the payments she seeks. She simply challenges the city's delay in paying her that which is hers.

Second, Kraebel's underlying property interest is of greater significance than is present in most other due process cases. Usually, the property interest claimed by the plaintiff is an entitlement to a benefit conferred by the state to promote certain public policy objectives, such as aiding the indigent or the disabled. In this case Kraebel's elderly tenants would be in that position. Kraebel herself, however, is not a supplicant seeking payments made available through a generous bureaucracy; she is a deprived property owner seeking reimbursement for being forced to shoulder the burden of long-deferred contractual payments under the SCRIE program, payments guaranteed to her by the government as a substitute for her right to receive payments directly from her elderly tenants.

One chapter in the history of the current SCRIE program underscores the constitutional significance of the excess SCRIE payments to landlords. In *Hirschel v. City of New York*, 460 N.Y.S. 2d 438, 440 (Sup. Ct. 1983), the state court struck down as unconstitutional the predecessor

to the current SCRIE regulation, which limited a landlord's annual reimbursement to the amount of real property taxes on the rental property. There was no provision for excess SCRIE. Because for some landlords the total of the SCRIE program's rent reductions exceeded their tax liabilities, they could never recoup the full amount of their lost rental income. The court held that such a result would constitute a taking of plaintiff's property without just compensation. *Id.* Thus, to assure that landlords alone were not left to bear a disproportionate amount of the public burden, the city undertook the obligation to reimburse the landlords for the full amount that eligible tenants are exempted from paying, even in the form of cash payments, if necessary.

This sort of statutory and constitutional "right" to reimbursement must be weighed by the court in determining whether "due process" has been provided, because the "flexible" nature of the due process inquiry calls for "such procedural protections as the particular situation demands." *Eldridge*, 424 U.S. at 334 (quotations omitted). "[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision-making process." *Id.* at 341. *Cf. Goldberg*, 397 U.S. at 264 (holding that benefits contingent on financial need required greater procedural protections).

Keeping in mind these two unusual aspects of Kraebel's due process claim, the district court on remand bearing in mind the difference appropriately accorded by-

courts to executive agencies regarding practicalities encountered by those agencies in administering legislative programs, *cf. Eldridge*, 424 U.S. at 347-48, should engage in a factual inquiry to determine whether the burdens and delays imposed by the city were reasonable. It may consider a variety of additional factors in making this determination: the procedures actually used by the city to determine whether a landlord is entitled to the claimed excess SCRIE payments, the factors the city considers, the level of difficulty in making the determination, the amount of work required, the amount of decision-making discretion given to the employees, the need for and availability of administrative appellate review, the necessity for the paperwork and supporting documentation required, the amount of time required to process similar claims, and any other factors that may bear on whether "due process" is provided. If, given the steps reasonably necessary to restore to Kraebel the rents kept from her by this program, the court finds that the city has taken an unduly long time to process her applications, the court should not hesitate to award damages, which may include interest, calculated at a market rate, from the time that the delay became unreasonable.

CONCLUSION

We reverse the dismissal of Kraebel's due process claim and remand for further consideration of the issue; we affirm the judgment of the district court in all other respects.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of March, one thousand nine hundred and ninety-two

PRESENT: HON. GEORGE C. PRATT
HON. J. DANIEL MAHONEY
HON. JOSEPH M. MCLAUGHLIN

Circuit Judges,

BARBARA KRAEBEL, d/b/a Barklee Realty Company,

Plaintiff-Appellant,

-v-

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is affirmed in part and reversed and remanded in part to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk
By:

/s
Edward J. Guardaro
Staff Attorney

OPINION AND ORDER AND JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BARBARA KRAEBEL, D/B/A BARKLEE REALTY CO.,

Plaintiff,

- against -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.

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OPINION AND ORDER

90 Civ. 4391 (MJL)

APPEARANCES:

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MARY JOHNSON LOWE, D.J.

Before this Court is a motion by the defendants, the New York City Department of Housing Preservation & Development and the New York City Department of Finance (together, "the City"), to dismiss plaintiff's § 1983 action under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). For the reasons set forth below, the City's motion to dismiss is granted.

BACKGROUND

The plaintiff, Barbara Kraebel, d/b/a Barklee Realty Co., is the owner of a sixteen-unit residential apartment building on 147th Street in Manhattan. The present suit arises out of the City's administration of two municipal programs applicable to landlords. The Senior Citizens Rent

Increase Exemption ("SCRIE") Program exempts certain senior citizens living in rent-controlled and rent-stabilized apartments from paying rent increases, and provides for reimbursement of landlords for the resulting lost income through propertytax abatements and cash payments.[1] The "J51" Program provides for property tax benefits for landlords who rehabilitate their buildings.[2]

Plaintiff had four SCRIE-exempted elderly tenants during the years 1988 through 1990, and was eligible for both tax abatements and cash "Excess" benefits under that Program. She complains, however, that extensive documentation and record-keeping requirements imposed by the City, along with delays in processing her applications, have unfairly deprived her of the benefits due. Specifically, plaintiff alleges that because of delays by the City, she was unable to submit the documents necessary to apply for 1988

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[1] The New York legislature authorized rent increase exemptions for senior citizens in 1972. New York Real Property and Tax Law ("N.Y. RPTL") § 467-b. New York City has implemented SCRIE under §§ 26-405(m) *et seq.*, 26-406, and 26-509 of the Administrative Code of the City of New York ("Administrative Code"). Under the SCRIE Program, landlords with tenants who receive exemptions may obtain property tax abatements equal to the rent increases foregone during a given year. If the amount foregone *exceeds* the property tax due that year, the landlord may then obtain the balance, or "Excess", in cash. N.Y. RPTL § 467-b.9; Administrative Code § 26-509.c(5).

[2] The J51 Program was authorized under N.Y. RPTL § 489(1960) and implemented under Administrative Code § 11-243 (formerly § J51-2.5).

Excess SCRIE benefits until May 1989, and that as of the time she filed this action in July 1990, the City had not yet acted on her claim. Amended Complaint at ¶¶ 8-16. Plaintiff alleges that she applied for 1989 Excess SCRIE benefits in May 1990, and had also received no action on this claim as of July 1990. *Id.* at ¶¶ 17-21. Further, she submitted claims for 1990 SCRIE benefits[3] on an ongoing basis, and these claims had also not been processed as of July 1990. *Id.* at ¶¶ 27-30.[4] Finally, she complains that the forms and procedures used by the City in administering the SCRIE Program are in general unnecessarily complex and burdensome. *Id.* at ¶¶ 32-45. For example, plaintiff claims that her 1988 application required 35 pages of supporting documentation, and her 1989 application required 30 pages. *Id.* at ¶ 36.

Plaintiff also alleges that she was eligible for certain benefits under the J51 Program for 1988 and 1989. She complains, in short, that the City favors some classes of landowners over others in handling J51 claims, provides inadequate explanations of its reasons for denying claimed

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[3] Plaintiff's 1990 claims were apparently for both tax-abatement and Excess SCRIE benefits.

[4] Since this suit was filed, the City has apparently processed plaintiff's claims for 1988 and 1989. Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss at 3. At present, the parties do not dispute the amounts due plaintiff under these claims. However, the City has demanded further documentation before making payment, which plaintiff has refused to provide. *Id.*

benefits, and improperly seeks waivers of rights from owners as a condition of considering claims. *Id.* at ¶¶ 48-63.[5]

Plaintiff, who is a lawyer, brought this action *pro se* under 42 U.S.C. § 1983, claiming that the City's maladministration of the two Programs violated her rights under the Fifth and Fourteenth Amendments to the Constitution, and the Contracts Clause. Defendants now move to dismiss plaintiff's Amended Complaint for failure to state a claim on which relief may be granted and, as to the claims addressing the J51 Program, for lack of subject matter jurisdiction.[6]

DISCUSSION

A. Jurisdiction

Defendants argue that this Court is barred from exercising jurisdiction over plaintiff's claims as to the J51 Program by the principle of comity embodied in the Tax Injunction Act, 28 U.S.C. § 1341 ("the Act"). The Act provides:

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[5] Since we conclude, below, that the Tax Injunction Act precludes our taking jurisdiction of plaintiff's claims as to the J51 Program, there is no need to set forth her complaints as to this Program in greater detail.

[6] A hearing was held before this Court on November 16, 1990. No substantive rulings were made at that time.

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As the Supreme Court has stated, "[t]his legislation, and the decisions of this Court which preceded it, reflect the fundamental principle of comity between our federal courts and state governments that is essential to [federalism], particularly in the area of state taxation." *Fair Assessment in Real Estate Assn v. McNary*, 454 U.S. 100, 103 (1981).

In *Fair Assessment*, the Court held that comity would bar assertion of § 1983 claims in federal courts against the validity of state tax systems. *Id.* at 116. This rule applies equally to facial challenges to tax programs and to claims, such as those in *Fair Assessment*, that address the administration of such programs. Nor is the bar restricted to actions for declaratory or injunctive relief directly limiting a litigant's tax liability; it extends, for example, to claims for damages against individual state tax officials. *Id.* at 113-15.[7] The unifying principle here is that the federal courts should strenuously avoid exercising their jurisdiction

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[7] As the Second Circuit has explained, "[w]hile it is the Tax Injunction Act that prevents federal courts from giving injunctive relief or declaratory relief.... it is the principle of comity that prevents a taxpayer from seeking damages in a § 1983 action...." *Long Island Lighting Co. v. Town of Brookhaven, infra*, 889 F.2d at 431 (citations omitted).

where it is likely to disrupt a state's ability to collect revenue, whether by halting the operation of a state tax program or by requiring that tax officials be routinely haled into federal court whenever a § 1983 claim is asserted. *Id.* at 115. *See also Long Island Lighting Co. [LILCO] v. Town of Brookhaven*, 889 F.2d 428, 431 (2d Cir. 1989).

Plaintiff has offered no persuasive reason why the Tax Injunction Act should not similarly preclude our taking jurisdiction of her claims relating to the J51 Program. The relief plaintiff seeks is essentially declaratory and injunctive in nature; if granted, such relief would directly reduce plaintiff's state property tax liability or, at minimum, require the City to alter its administrative regulations and practices under the Program. Further, consideration of her claims would necessarily require detailed inquiry into these same regulations and practices.[8] The present § 1983 action thus implicates precisely the concerns addressed by the Court in *Fair Assessment*.

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[8] Plaintiff argues that consideration of her claims would not "require... substantive analysis of tax statutes... or in any way disrupt tax administration," because she challenges only "procedures" under the Program. Plaintiff's Memorandum at 16 *et seq*. However, as noted above, *Fair Assessment* forecloses just such distinctions. *See also Czajowski v. Illinois*, 460 F.Supp. 1265, 1272 (D.C. Ill. 1977), *aff'd*, 588 F.2d 839 (7th Cir. 1978) ("[The Tax Injunction Act] cannot be avoided by attacks on the administration and implementation of [a] taxing scheme rather than on the validity of the tax itself").

Nor do we accept plaintiff's assertion that the inadequacy of available remedies under state law takes this case outside the Act. This Circuit has held that the avenues of constitutional challenge open to New York taxpayers in the state courts are adequate to satisfy the "fair, speedy and efficient" requirement of the Tax Injunction Act and the analogous "plain, adequate and complete" standard governing comity. *Long Island Lighting Co. v. Town of Brookhaven, supra*, 889 F.2d at 431-33.[9] Therefore, we grant defendants' Rule 12(b)(1) motion to dismiss plaintiff's claims as to the J51 Program.[10]

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[9] The *LILCO* Court noted that the plaintiff there could raise its constitutional challenges to the defendant town's tax assessments via (1) a declaratory judgment action under N.Y. CPLR § 3001 and N.Y. Gen.Mun.L. § 51; (2) a § 1983 action in court; or (3) tax certiorari proceedings under N.Y. RPTL § 700 *et seq.* *Id.* A similar range of options would seem to be available to plaintiff here.

[10] Defendants' motion does not challenge our jurisdiction over plaintiff's claims as to the SCRIE Program. Although SCRIE, like the J51 Program, uses property tax abatement as a means of reimbursing landowners, it is unclear whether the use of such a mechanism by itself implicates the Tax Injunction Act. *Compare O'Brien v. Dreyfus*, 493 F.Supp. 476 (E.D.Wis. 1980), *and Hicknann v. Wujick*, 333 F.Supp. 1221 (E.D.N.Y. 1971) (Act precluded federal court jurisdiction over constitutional challenge to state tax credit schemes), *with Levy v. Parker*, 346 F.Supp. 897 (E.D. La. 1972), *aff'd* 411 U.S. 978 (1973) (Act did not bar federal court challenge to state revenue-sharing scheme). Plaintiff argues that, unlike the J51 Program, SCRIE is

(continued...)

B. Cognizability

In *Hirschel v. City of New York*, 117 Misc.2d 190, 460 N.Y.S.2d 438 (N.Y.County Sup.Ct. 1983), the court held unconstitutional the senior citizen rent increase exemption scheme in force in New York City at that time, which, unlike the current system, sought to compensate landlords for lost rental income solely by means of tax abatements. Where landlords' losses exceeded their property tax liability, the court held, the failure to provide additional compensation improperly shifted the economic burden of subsidizing rent regulation for senior citizens from the public to the individual landlords, in violation of due process, equal protection, and the Takings Clause. *Id.* at 440-41. In the present case, plaintiff seeks, in effect, to have extend the holding of *Hirschel* to require the City to provide a faster and simpler method than it currently does for landlords to obtain the cash excess payments available under SCRIE.

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[10] (...continued)
"essentially a rent subsidy program," and hence not covered by the Act. Plaintiff's Memorandum at 13. In any event, plaintiff's complaints as to the SCRIE Program are directed mainly at her difficulties in obtaining the cash Excess payments--and not the tax benefits--available under the Program. To this extent, we are willing to assume, *arguendo*, that we have jurisdiction to consider whether plaintiff has stated a cognizable claim under § 1983.

"In general, a complaint may be dismissed only if its claims are unquestionably insufficient to entitle the plaintiff to relief no matter what supporting facts might be proved at trial." *Duncan v. AT&T Communications, Inc.*, 668 F.Supp. 232, 234 (S.D.N.Y. 1987) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Goldman v. Belden*, 754 F.2d 1059, 1065 (2d Cir. 1985)). In considering whether her Amended Complaint states a cause of action under federal law, we are not obliged to give plaintiff here, an attorney, the benefit of the "less stringent standards" normally applied to *pro se* complaints (*see, e.g., Bass v. Jackson*, 790 F.2d 260, 262 (1986). We hold that plaintiff's allegations as to the City's administration of the SCRIE Program are "unquestionably insufficient" to afford relief under § 1983, since they fail to establish the denial of any constitutionally-protected right.

(1) Confiscation Claim

First, the delays and documentation requirements of which plaintiff complains do not rise to the level of a "taking" within the meaning of the Fifth Amendment, as applied to the States by the Fourteenth. Rent regulation, which by its very nature deprives landlords of some potential uses of their property, has long been upheld as a proper exercise of state and local government police powers. *E.g., Bowles v. Willingham*, 321 U.S. 503 (1944). The Supreme Court has "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without

paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("statutes regulating the economic relations of landlords and tenants are not *per se* takings").

The SCRIE Program seeks to balance three interests: the City's desire to provide rent protection for the City's elderly poor beyond that afforded by rent control and stabilization, the requirement that landlords be guaranteed reasonable return on their investments, and the public's interest in ensuring that benefits are disbursed only after a landlord's eligibility has been shown. Given this, neither the documentation requirements of which plaintiff complains, nor the alleged delays (the longest of which was fourteen months), was so unreasonable or inordinate as to amount to a confiscation of plaintiff's property by the City. *Cf. Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) (finding scheme there a "rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment").

(2) Due Process Claim

Second, even if the alleged difficulties in obtaining Excess SCRIE benefits were seen to deprive plaintiff of

some constitutionally-protected property interest,[11] the remedies available under New York law are sufficient to satisfy plaintiff's right to due process. In *Woodner v. Eimecke*, No. 87 Civ. 8872 (MJL) (S.D.N.Y. July 9, 1990), this Court granted a motion to dismiss a similar § 1983 action by a landlord, in which he alleged that the City's maladministration of certain rent regulations had deprived him of an array of property rights analogous to those asserted by plaintiff in the present case. We held in *Woodner* that even assuming the plaintiff's asserted rights were constitutionally protected, the review of administrative actions under New York CPLR Article 78 satisfied his right to due process. Slip. Op. at 10-15.[12] In doing so, we specifically rejected the contention, also raised by plaintiff here, that the possible necessity of bringing multiple Article

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[11] *But see Isaacs v. Bowen*, 865 F.2d 468, 477 (2d Cir. 1989) (rejecting due process claim premised upon administrative delays of six and nineteen months); *Perez v. Lavine*, 412 F.Supp. 1340, 1355-56 (S.D.N.Y. 1976) (federal agency's practices which resulted in delays in applications for benefits but did not preclude the making of such applications did not violate due process).

[12] Citing *Campo v. New York City Employees' Retirement System*, 843 F.2d 96 (2d Cir.), *cert. denied*, 488 U.S. 889 (1988) (post-deprivation Article 78 proceedings adequate to protect former city employee's pension claim); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (Article 78 proceedings adequate to protect plaintiff's alleged interest in fair and impartial review of his application for access to redevelopment projects); *Oberlander v. Perales*, 740 F.2d 116 (2d Cir. 1984) (Article 78 proceedings adequate as to plaintiff's challenge to City agency's reductions in Medicaid reimbursements).

78 challenges was inconsistent with due process. *Id.* at 14. In short, plaintiff here has simply failed to allege any facts to give us reason to suspect that state court proceedings are likely to result in the erroneous deprivation of her interests. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).[13] As such, she has failed to state a claim of denial of due process.

(3) Equal Protection Claim

Plaintiff has also failed to state a claim that she has been unconstitutionally denied equal protection. A similar claim was rejected by the Supreme Court in *Pennell v. City of San Jose*, *supra*, 485 U.S. at 14-15, in which the Court held that a rent regulation, rationally related to a legitimate governmental purpose, does not offend the Equal Protection Clause merely because it affects landlords with eligible tenants more than it does landlords without such tenants.

> In light of our conclusion... that the [challenged city ordinance provisions] are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude

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[13] Plaintiff's Amended Complaint boldly asserts that available state remedies are inadequate because "[s]ince... the end of World War II, prevailing political sentiment in New York has been extraordinarily hostile to the rights and interests of owners of rental properties like Plaintiff." Amended Complaint at ¶ 81. We agree with defendants that this seems little more than an admission to impermissible forum-shopping.

> that it is irrational for the Ordinance to treat certain landlords differently on the basis of whether or not they have [covered] tenants.

Id. at 14.

Similarly here, the SCRIE Program concededly serves a legitimate governmental purpose, the protection of elderly low-income tenants. *See Gillead v. Fordham Hill Owners' Corp.*, 601 F.Supp. 530 (S.D.N.Y. 1985). It is true that the Program's reimbursement scheme places an additional burden on landlords with SCRIE-eligible tenants, that of routinely applying to the City for reimbursement and waiting for the City to process their applications. However, the facts alleged by plaintiff are insufficient to show that the additional burden imposed is not rationally related to the Program's purpose and the need, discussed above, to reconcile the competing interests of tenants, landlords, and the public.

(4) Impairment of Contract Claim

Finally, plaintiff has not stated a claim under the Contracts Clause. That provision limits the ability of states and municipalities to enact *legislation* which impairs individuals' ability to contract; it does not apply to administrative or individual official acts. *Ritzie v. City University of New York*, 703 F.Supp, 271, 277 (S.D.N.Y. 1989). On the facts alleged in the Amended Complaint, we cannot see how the SCRIE Program, which seeks to

reimburse landlords for lost rental income, may be seen on its face to substantially *impair* plaintiff's reasonable contractual expectations. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (discussing this "threshold inquiry").

Indeed, housing of low-income and elderly tenants has historically been an area of substantial government involvement and regulation, and plaintiff can hardly be surprised to find that the City requires exhaustive documentation and review of a landlord's claim that she is entitled to a cash payment in addition to the full abatement of her property taxes. *See Id.*[14] Given that the SCRIE Program arises in such a pervasively-regulated area and seeks on its face only to *fulfill* landlords' contractual expectations, plaintiff's claim under the Contracts Clause is insufficient as a matter of law.

Conclusion

For the reasons set forth above, defendants' motion to dismiss plaintiff's claims as to the J51 Program under Fed.R.Civ.P. 12(b)(1), and defendants' motion to dismiss

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[14] "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.... The Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.' *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)."

plaintiff's claims as to the SCRIE Program under Fed.R.Civ.P. 12(b)(6), are granted.

It Is So Ordered.

Dated: New York, New York
May 13, 1991

/s Mary Johnson Lowe
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BARBARA KRAEBEL, D/B/A BARKLEE REALTY CO.,

Plaintiff,

- against -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.

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JUDGMENT

90 CIVIL 4391 (MJL)

Defendants having moved to dismiss plaintiff's Section 1983 action under F.R.Civ.P. 12(b)(1) and 12(b)(6), and the said motions having come before the Honorable MARY JOHNSON LOWE, U.S.D.J., and the Court thereafter on May 16, 1991, having handed down its opinion and order (#68016); granting defendants' motion to

dismiss plaintiff's claims as to the J51 Program under F.R.Civ.P. 12(b)(1), and defendants' motion to dismiss plaintiff's claims as to the SCRIE Program under F.R.Civ.P. 12(b)(6), it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion to dismiss plaintiff's claims as to the J51 Program under F.R.Civ.P. 12(b)(1) and defendants' motion to dismiss plaintiff's claims as to the SCRIE Program under F.R.Civ.P. 12(b)(6), be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed.

Dated: New York, New York
May 29, 1992

/s Joseph F. Cloidt
Acting Clerk

ORDER DENYING REHEARING IN COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of May, one thousand nine hundred and ninety-two.

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BARBARA Kraebel d/b/a
BARKLEE REALTY COMPANY,

Plaintiff-Appellant,

- against -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants-Appellees.

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DOCKET NUMBER
91-7665

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees, NYC Department of Housing Preservation & Development and NYC Department of Finance,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s
ELAINE B. GOLDSMITH
Clerk

ORDER OF COURT OF APPEALS DEEMING PETITION FOR REHEARING TIMELY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KRAEBEL v. NYC DEPT. OF HPD

91-7665

Brief statement of the relief requested:

Order deeming petition for rehearing timely filed

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

4-14-92
Date

/s Joseph M. McLaughlin
Circuit Judge

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BARBARA Kraebel d/b/a
BARKLEE REALTY COMPANY

Plaintiff-Appellant,

- against -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants-Appellees.

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Civil Action No. 90-4391

Judge Lowe

AMENDED COMPLAINT

Plaintiff, Barklee Realty Company, by its principal, Barbara Kraebel, appearing *pro se*, alleges the following complaint against Defendants:

JURISDICTION

1. The bases of this Court's jurisdiction herein are 28 U.S.C. Sec. 1331, 28 U.S.C. Sec. 1343, and 42 U.S.C. Sec. 1983. The case raises federal questions involving the deprivation under color of State authority of the civil rights of Plaintiff under Article I Section X(1) and the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff claims that Defendants have impaired the obligations of contracts with Plaintiff, deprived Plaintiff of property without due process of law and without just compensation, and have denied Plaintiff the equal protection of the laws.

VENUE

2. The venue of this Court is founded upon 28 U.S.C. Sec. 1391(b). The claims arose, and the principal offices of the Defendants are located, in the Southern District of New York.

PARTIES

3. Plaintiff is, and at all times relevant to this proceeding was, a proprietorship doing business under the laws of New York State. Plaintiff's principal office is 60 East 42nd Street, Room 1146, New York, New York 10165.

4. Defendant New York City Department of Housing Preservation and Development (HPD) is a New York City governmental agency, having its principal office at 100 Gold Street, New York, New York 10038.

5. Defendant New York City Finance Department (Finance Department) is a New York City governmental agency, having its principal office at the Municipal Building, New York, New York 10007.

FIRST CAUSE OF ACTION

6. Plaintiff owns and manages a 16-unit multiple dwelling known as 205 West 147th Street, in the Borough of Manhattan, City, County and State of New York (Property).

7. Upon information and belief, Respondents are the City agencies responsible for administration of the Senior Citizen Rent Increase Exemption Program (SCRIE Program) under Section 467-b of the New York State Real Property Tax Law and Sections 26-601ff of the New York City Administrative Code. The SCRIE Program prohibits owners from increasing rents of senior citizen tenants with incomes below a specified amount (SCRIE Tenants) and obligates the City of New York to provide real estate tax credits and cash payments to such owners in the amount of such prohibited rent increases.

8. During calendar year 1988 Plaintiff had four SCRIE Tenants at the Property.

9. Plaintiff duly submitted to HPD all documents necessary to obtain benefits under the SCRIE Program for said tenants for 1988 in as timely a manner as HPD's procedures permitted.

10. Since the rents owing to Plaintiff under the SCRIE program exceeded Plaintiff's real estate tax liability on the Property for 1988, Defendants owed Plaintiff at the end of 1988 a $1,080.69 cash payment to cover such excess (Excess SCRIE).

11. In January 1989 Plaintiff applied to HPD for payment of such Excess SCRIE, but HPD returned the application because all required supporting documents were not attached.

12. The reason Plaintiff had not attached all such documents was that several of them had not as yet been issued to Plaintiff by HPD or the New York State Division of Housing and Community Renewal (DHCR).

13. After HPD and the DHCR issued such documents, Plaintiff reapplied to HPD in May 1989 for the Excess SCRIE for 1988, now in the amount of $986.90. Said second application requested a different amount than the original application because the documents issued belatedly by DHCR changed the rents retroactively from

what they had been at the end of 1988 and because the documents issued by HPD in some cases covered rents for more than one year so that they could not be submitted for reimbursement as Excess SCRIE under HPD's procedures.

14. In August 1989 Plaintiff telephoned HPD to ascertain the status of the application. Ms. Gong in HPD's office told Plaintiff that she was processing the application, and that this normally took nine months from the date of filing.

15. In April 1990, eleven months after Plaintiff had filed the second application for 1988 Excess SCRIE, Plaintiff again telephoned Ms. Gong to request the status of the application. Ms. Gong advised Plaintiff at this time that she was still processing the application and that she had "no idea" when processing would be completed because she was then still working on Excess SCRIE applications filed in the first quarter of 1989.

16. To date Plaintiff has not had any other response to Plaintiff's application for 1988 Excess SCRIE.

17. During 1989 Plaintiff had four SCRIE Tenants at the Property.

18. Plaintiff duly submitted to HPD all documents necessary to obtain benefits under the SCRIE Program for said tenants for 1989 in as timely a manner as HPD's procedures permitted.

19. Since the rents owing to Plaintiff for 1989 under the SCRIE Program exceeded Plaintiff's real estate tax liability on the Property for that year, Defendants owed Plaintiff at the end of 1989 a $1,919.57 cash payment to cover Excess SCRIE.

20. In May 1990, Plaintiff applied to HPD for payment of such Excess SCRIE. Plaintiff was unable to apply earlier because HPD and DHCR had not issued to Plaintiff some of the required supporting documents.

21. To date Plaintiff has had no response to said application for 1989 Excess SCRIE.

22. The rents for apartments at the Property are due on the first day of each month, and Plaintiff cannot delay payment of Plaintiff's bills or delay provisions of service to the Property until Defendants get around to paying Excess SCRIE.

23. The rents for apartments at the Property are regulated by law, and such regulation does not take into account delays in collecting rents such as occur under the SCRIE Program.

24. Under applicable rent regulations, Plaintiff is required to continue and renew leases and tenancies for SCRIE Tenants even though Plaintiff is unable to collect their rents as they accrue and for indefinite periods into the future.

25. Based upon the foregoing, Plaintiff requests that this Court order Defendants to pay damages to Plaintiff equal to Excess SCRIE of $986.90 for 1988 and $1,919.57 for 1989, with interest thereon from the due date of the rents upon which said sums are owing.

SECOND CAUSE OF ACTION

26. Plaintiff repeats and realleges Paragraphs 1-25 above.

27. To date in 1990, Plaintiff has four SCRIE Tenants at the Property.

28. Plaintiff has duly submitted to HPD all documents necessary to obtain benefits under the SCRIE Program for said tenants for 1990 in as timely a manner as HPD's procedures permit.

29. To date, Plaintiff has been able to collect only $705.50 of the $2,331.36 owing under the SCRIE Program for the Property through the end of June.

30. Plaintiff has been unable to collect the full rents owing under the SCRIE Program because HPD has not issued to Plaintiff some of the necessary documents and because the rents owing to Plaintiff under the SCRIE Program for 1990 exceed Plaintiff's real estate tax liability on the Property for that year.

31. After Plaintiff receives real estate tax abatements and exemptions for the Property under the J51 Program, described hereinafter, the imbalance between rent owing and SCRIE tax credits will increase because Plaintiff will owe little, if any, real estate taxes on the Property and will rely entirely on Excess SCRIE payments for all rents under the SCRIE Program.

32. The forms which Plaintiff must submit in order to obtain rents under the SCRIE Program are unnecessarily complex and require Plaintiff to spend excessive amounts of time collecting the rent for SCRIE Tenants and paying the real estate taxes on the Property.

33. Attached hereto as Exhibit A is a prototypical form which Plaintiff must file with each quarterly real estate tax payment on the Property. Said form requires Plaintiff to assemble detailed information and to complete, notarize and mail forms as well as to pay the tax balance by check. These obligations are substantially more onerous than that of writing a check for the full tax amount.

34. Attached hereto as exhibit B is a prototypical form which Plaintiff must file annually to apply for Excess SCRIE. Said application requires Plaintiff to assemble detailed information, attached voluminous supporting documentation, complete, notarize and mail the application, and be subject to audit by Respondents with respect thereto. These obligations are substantially more onerous than that

of receiving checks in payment of the correct rents each month as they accrue.

35. The supporting documentation required to be attached to the annual Excess SCRIE application includes copies of the following: all certificates issued by HPD setting forth the rent and SCRIE entitlements for each SCRIE tenant; the official DHCR annual rent registration for each SCRIE Tenant; all DHCR certificates setting forth changes from the rent as registered annually; the quarterly forms filed with each real estate tax payment (see Paragraph 33 and Exhibit A); the front and back of each check covering real estate tax payments; and all receipts for real estate tax payments issued by the Finance Department.

36. The supporting documentation required for Plaintiff's 1988 Excess SCRIE application was 35 pages. The supporting documentation for Plaintiff's 1989 Excess SCRIE application was 30 pages.

37. Defendants already have in their files virtually all of the supporting documentation and the information on the forms referred to in Paragraphs 33-35 before Plaintiff is required to recompile and resubmit it to make tax payments or obtain Excess SCRIE because much of it has been issued by Defendants themselves and because Plaintiff and SCRIE Tenants are required to submit copies of leases, forms certifying to rent amounts, and DHCR certificates throughout the year.

38. The rents at the Property are regulated by law and do not compensate Plaintiff for the burdens imposed by the SCRIE program. Plaintiff is not permitted to charge higher rents to SCRIE Tenants to provide such compensation or to terminate or refuse to renew tenancies and leases of SCRIE Tenants on such account.

39. The documents Defendants require owners to submit under the SCRIE Program are unnecessarily and unreasonably burdensome, and, upon information and belief, delay Defendants' processing and payment of Excess SCRIE and deter and prevent many property owners from collecting SCRIE amounts to which they are entitled.

40. SCRIE Tenants are by definition senior citizens with limited incomes, and, upon information and belief, many of the buildings in which they reside have low rent rolls. The owners of these buildings are least likely to be in a position to wait long periods for rent payments or to hire accountants, lawyers, and others to assist with complicated forms or to prosecute Defendants when Excess SCRIE remains unpaid.

41. Upon information and belief, Defendants have assigned inadequate staff to process SCRIE documentation and applications for Excess SCRIE and have failed to allocate sufficient funds from the City budget to pay all claims for Excess SCRIE as they are received.

42. As a result, Plaintiff and many other owners in comparable circumstances have become involuntary and uncompensated creditors of the City of New York in lieu of receiving rents. Upon information and belief, many of these owners desperately need these rents, in some cases to pay City charges which will otherwise be used by the City as justification for taking these buildings *in rem*.

43. During the period Plaintiff has been waiting for Defendants to pay Excess SCRIE, Plaintiff has had to pay to the City of New York, among other things, water and sewer charges on the Property, real estate taxes and water and sewer charges on other real property, and income taxes.

44. Plaintiff submits that Plaintiff and other owners to whom rents are owing under the SCRIE Program should not be required to pay their debts to the City of New York while Defendants delay and refuse to pay these rents and that Defendants are either administering the SCRIE Program with deliberate indifference to or reckless disregard of the rights of owners to prompt rent payments or are intentionally and deliberately violating such rights.

45. Based on the foregoing, Plaintiff requests that this Court declare that the SCRIE Program impairs leasehold obligations to pay rent for use of the Property and comparable properties, constitutes a taking of property without due process of law and without just compensation, and denies Plaintiff and other similarly situated owners the

equal protection of the laws in violation of Article I, Section X(1) and the Fifth and Fourteenth Amendments to the United States Constitution.

THIRD CAUSE OF ACTION

46. Plaintiff repeats and realleges Paragraphs 1 - 45 above.

47. Based upon the foregoing, Plaintiff requests that this Court permanently enjoin Defendants to (i) assign sufficient personnel to the SCRIE Program to ensure that Plaintiff and other owners are able to collect all rents under the SCRIE Program promptly as they accrue; (ii) segregate sufficient funds from the City budget to pay all rents owing to Plaintiff and other owners under the SCRIE Program promptly as they accrue; (iii) make it unnecessary for Plaintiff and other owners to file applications and forms to obtain rents owing under the SCRIE Program except simple one-page non-notarized forms stating the rent for each SCRIE Tenant each time the rent changes, accompanied by a copy of the lease or other documents establishing the basis for the change; (iv) pay Plaintiff and other owners all rents owing under the SCRIE Program within 10 days after the applicable rent is due, either by check or by certificate of tax credit which the owner or the owner's assignee may use to pay real estate taxes and water and sewer charges on any real property in the City of New York and any income taxes owing to the City of New York; and (v) pay interest to Plaintiff and other owners on all late payments under the

SCRIE Program, except to the extent such lateness is due solely to the owner's failure to file the form referred to in (iii) above, at the highest rate charged by the City of New York from time to time on late payments of real estate taxes, water and sewer charges, and income taxes.

FOURTH CAUSE OF ACTION

48. Plaintiff repeats and realleges Paragraphs 1 - 6 above.

49. Upon information and belief, Respondents are the City agencies responsible for administration of the program under Section 489 of the New York State Real Property Tax Law and Sections 11-243ff of the New York City Administrative Code, providing for real estate tax abatements and exemptions to certain property owners who improve their properties (J51 Program).

50. In June 1988 Plaintiff applied to HPD for tax exemption and tax abatement under the J51 Program for work at the Property costing $8,441 (J51 Docket No. 2407/1988), submitting therewith all documents required from Plaintiff under HPD's regulations for approval thereof.

51. In August 1988 Plaintiff applied to HPD for additional tax exemption and tax abatement under the J51 Program for additional work at the Property costing $36,494 (J51 Docket No. 225/1989), submitting therewith all

documents required from Plaintiff under HPD's regulations for approval thereof.

52. HPD did not process said applications in a reasonable and responsible manner but instead subjected said applications to repetitive reviews by numerous HPD personnel, several of whom demanded documents not required under the J51 regulations, duplicates of documents already submitted, or changes in submitted documents, and several represented that if Plaintiff would submit one more document or visit HPD to make one more change in the documents, HPD's review would be complete and approval of the application forthcoming.

53. Upon information and belief, HPD subjects other owners to similar harassment when they apply for benefits under the J51 Program and many of these owners are unable to obtain such benefits because they do not or cannot comply with HPD's unreasonable demands.

54. Upon information and belief, HPD approves applications from other owners much more expeditiously and without such intense and repetitive scrutiny.

55. In February 1990, one year and eight months after Plaintiff's application, HPD delivered to Plaintiff a Certification of Eligibility granting tax exemption and tax abatement for $5,800 of the $8,441 for which Plaintiff applied under J51 Docket No. 2407/1988.

56. In February 1990, one year and six months after Plaintiff's application, HPD delivered to Plaintiff a Certificate of Eligibility granting tax abatement for $18,200 of the $36,494 for which Plaintiff applied under J51 Docket No. 225/1989. Plaintiff was unaware that the customary tax exemption had not also been granted on this application until recently when Plaintiff noticed the words "Abatement Only" typed unobtrusively on the Certificate of Eligibility.

57. At the time of delivery of the Certificates of Eligibility and as a condition thereto, HPD demanded that Plaintiff sign waivers of Plaintiff's legal right to challenge or appeal the partial denial of said applications, which Plaintiff signed only under duress and after making such changes therein as seemed appropriate at the time.

58. Upon information and belief, HPD coerces similar waivers from other applicants under the J51 Program even though said applicants are in no position to evaluate their legal rights and remedies when such waivers are demanded.

59. After reviewing the foregoing Certificates of Eligibility, Plaintiff asked HPD to explain the partial denials of benefits. HPD personnel advised Plaintiff by telephone of some reasons and agreed to reconsider the denial of tax exemption under J51 Docket No. 225/1989.

60. Plaintiff considers many of HPD's reasons for denial of J51 benefits to be clearly improper and has

requested written explanations of the denials and a copy of the report of the HPD inspector who examined the work at the Property.

61. HPD has agreed to provide such written explanations and report to Plaintiff but has not done so to date or advised Plaintiff whether the tax exemption under review has been approved.

62. Plaintiff submits that Respondents have wrongfully denied Plaintiff benefits to which Plaintiff is entitled under the J51 Program, have wrongfully refused to state the reasons for such denial in writing, and are either administering the J51 Program with deliberate indifference to or reckless disregard for the rights of Plaintiff and other owners to such benefits or are intentionally and deliberately violating such rights.

63. Based upon the foregoing, Plaintiff requests that this Court order HPD to issue revised Certificates of Eligibility for tax exemption and tax abatement under J51 Docket No. 2407/1988 in the amount of $8,441 and under J51 Docket No. 225/1989 in the amount of $36,494, or in lieu thereof provide satisfactory written explanations of the reasons for any denial and a copy of the HPD inspector's report.

FIFTH CAUSE OF ACTION

64. Plaintiff repeats and realleges Paragraphs 1-6 and 49-63 above.

65. Based upon the foregoing, Plaintiff requests that this Court order Defendants to pay damages to Plaintiff equal to all real estate taxes on the Property payable by Plaintiff from time to time on account of Defendants' failure to grant all of the benefits to which Plaintiff is entitled under the J51 Program, together with interest thereon from the date of payment.

SIXTH CAUSE OF ACTION

66. Plaintiff repeats and realleges Paragraphs 1-65 above.

67. As an owner of rental housing in New York City, Plaintiff is entitled to apply for benefits under various governmental programs administered by Defendants.

68. Upon information and belief, Defendants administer many of such programs in a manner that discriminates against private owners like Plaintiff and in favor of others who have no greater entitlement to such benefits.

69. Based upon the foregoing, Plaintiff requests that this Court permanently enjoin Defendants (i) from

harassing private property owners who apply for benefits under governmental programs, (ii) from processing applications under government programs in a manner which discriminates against some private owners of rental housing; (iii) from denying applications for governmental benefits without written explanations; and (iv) from soliciting waivers of legal rights from private parties under coercive circumstances, upon little or no notice, or at any time such parties are unrepresented by legal counsel in a position to evaluate and advise as to the effect of such waivers.

SEVENTH CAUSE OF ACTION

70. Plaintiff repeats and realleges Paragraphs 1 - 69 above.

71. Defendants are governmental agencies with a legal and fiduciary duty to deal fairly with Plaintiff and other property owners when such owners apply for benefits under governmental programs.

72. Instead of dealing fairly with such owners, Defendants are implementing unreasonable procedures which unduly oppress many of such owners, serve no legitimate public purpose, and prevent Plaintiff and other similarly-situated owners from obtaining governmental benefits to which they are entitled.

73. Plaintiff submits that Defendants know (i) that their procedures prevent many property owners from

obtaining benefits to which they are entitled under the SCRIE Program, the J51 Program, and other programs administered by Defendants, (ii) that most of these owners have no practical redress for Defendants' wrongful administration of these programs, and (iii) that some of these owners will be compelled to abandon their properties to the City without receiving any compensation therefor because, among other reasons, these owners cannot operate their properties without the benefits of these programs.

74. Plaintiff submits that the aforesaid demonstrates that Defendants are administering the SCRIE Program, the J51 Program, and other programs on a fraudulent basis which has compelled Plaintiff to seek redress in this legal proceeding.

75. Based on the foregoing, Plaintiff requests that this Court award Plaintiff treble damages on all amounts found owing to Plaintiff in this proceeding.

EIGHTH CAUSE OF ACTION

76. Plaintiff repeats and realleges Paragraphs 1 - 75 above.

77. Because of rent regulations applicable to the Property, Plaintiff cannot charge rents which compensate Plaintiff for the time and expense spent on this proceeding or enable Plaintiff to retain attorneys and others to assist in prosecuting the same.

78. This proceeding presents serious Constitutional issues which address grievances by many owners who cannot prosecute them on their own behalf or afford to retain professional assistance for such purpose.

79. Plaintiff is an attorney-at-law who would be entitled to compensation under 42 U.S.C. Sec. 1988 for prosecuting such proceedings on behalf of others.

80. Based upon the foregoing, Plaintiff requests that this Court order Defendants to pay Plaintiff all of Plaintiff's costs and disbursements of this proceeding, together with an appropriate hourly fee for Plaintiff's legal work in connection with the prosecution hereof.

INADEQUACY OF STATE REMEDIES

81. Since the inception of rent controls at the end of World War II, prevailing political sentiment in New York has been extraordinarily hostile to the rights and interests of owners of rental properties like Plaintiff.

82. New York statutes, regulations, and administrative and judicial practices and procedures reflect this adverse political sentiment and make it virtually impossible for owners like Plaintiff to challenge governmental abuses.

83. Since many judges in New York State courts are elected, Plaintiff believes that this adverse political sentiment also influences the State judiciary to a much greater extent than is the case with appointed judges in federal courts.

84. 42 U.S.C. Sec. 1983 provides a federal remedy for governmental abuse of political minorities in such situations.

85. For these reasons, Plaintiff believes that New York State courts do not provide a reliable forum for the adjudication of the issues raised in this proceeding and that federal court is the appropriate forum.

SUMMATION

86. Unless the requested relief is granted, Plaintiff is and will be aggrieved and injured because Plaintiff will be required to operate the Property without the rent and without the tax abatements and exemptions to which Plaintiff is entitled at law and in equity and because Plaintiff will continue to be subject to Defendants' unreasonable and prejudicial administration of governmental programs applicable to Plaintiff.

87. Except as requested herein, Plaintiff has no adequate remedy at law for the relief sought herein.

88. Plaintiff has duly given the New York City Comptroller at least 30 days notice of Plaintiff's intention to seek redress for the governmental abuses alleged herein, and to the best of Plaintiff's knowledge and belief, the Comptroller has taken no action to redress the same.

89. The statutory periods for bringing these causes of action under New York State law have not elapsed since the acts and omissions of Defendants which form the bases of the causes of action hereunder.

WHEREFORE, PLAINTIFF RESPECTFULLY REQUESTS:

1. That this Court accept jurisdiction of this proceeding;

2. That this Court direct Defendants to pay damages to Plaintiff in sums equal to Excess SCRIE of $986.90 for 1988, $1,919.57 for 1989, and interest thereon from the due date of the rents upon which said amounts are owing (First Cause of Action);

3. That this Court declare that the SCRIE Program impairs leasehold obligations of SCRIE Tenants to pay rent in violation of Article I Section X(1) of the United States Constitution and constitutes a taking of property without just compensation and without due process of law and denies the equal protection of the laws in violation of

the Fifth and Fourteenth Amendments to the United States Constitution (Second Cause of Action);

4. That this Court permanently enjoin Defendants to (i) assign sufficient personnel to administration of the SCRIE Program, (ii) segregate sufficient funds from the City budget to pay amounts owing under the SCRIE Program promptly, (iii) reduce the obligations of property owners under the SCRIE Program, (iv) pay all amounts owing under the SCRIE Program by check or assignable certificate usable to pay real estate taxes, water and sewer charges, and income taxes owing to the City, and (v) pay interest on late payments under the SCRIE Program at rates like those charged by the City for late tax payments (all as more particularly set forth in Third Cause of Action);

5. That this Court order HPD to issue revised Certificates of Eligibility to Plaintiff under the J51 Program for full tax exemption and tax abatement of $8,441 under J51 Docket No. 2407/1988 and $36,494 under J51 Docket No. 225/1989, or in lieu thereof to provide satisfactory written explanations of the reasons for denial and a copy of the HPD inspector's report (Fourth Cause of Action);

6. That this Court order Defendants to pay damages to Plaintiff equal to all real estate taxes on the Property payable by Plaintiff from time to time on account of Defendants' failure to grant all of the benefits to which Plaintiff is entitled under the J51 Program, together with

interest thereon from the date of payment (Fifth Cause of Action);

7. That this Court permanently enjoin Defendants (i) from harassing private property owners who apply for benefits under governmental programs, (ii) from processing applications under governmental programs in a manner which discriminates against some private owners of rental housing; (iii) from denying applications for governmental benefits without written explanations; and (iv) from soliciting waivers of legal rights from private parties in most circumstances (as more particularly set forth in Sixth Cause of Action);

8. That this Court award treble damages to Plaintiff on the basis of Defendants' fraud (Seventh Cause of Action);

9. That this Court order Defendants to pay all of Plaintiff's costs and disbursements of this proceeding, together with an appropriate hourly fee for legal work done by Plaintiff in the prosecution hereof (Eighth Cause of Action); and

10. That this Court order such other and further relief as this Court deems appropriate or as the nature of the proceeding requires.

Dated: New York, New York
July 6, 1990

/s
Barbara Kraebel
Petitioner *pro se*
Barklee Realty Company
60 East 42nd Street
- #1146
New York, NY 10165
(212) 831-1012

To: Clerk of the United States
District Court
Southern District of New York
40 Centre Street
New York, New York

New York City Department of
Housing Preservation and
Development
Legal Affairs Department
100 Gold Street -
9th floor, Part E
New York, New York 10007

New York City Department
of Finance
Municipal Building -

Room 2320
New York, New York 10007

Corporation Counsel of the
City of New York
100 Church Street -
5th floor
New York, NY 10007

NEW YORK CITY ADMINISTRATIVE CODE SECTION 26-405[m]

Findings. The [City] [C]ouncil finds that there is an acute and continuing housing shortage; that this shortage has and continues to have an adverse effect on the population and especially on inhabitants of the city who are sixty-two years of age or older and of limited means, who cannot pay enough rent to induce private enterprise to maintain decent housing at rents they can afford to pay; that this condition is and continues to be particularly acute in a time of rising costs such as the present; that present rising costs and the continuing increase in rents pursuant to amendments to the New York city rent and rehabilitation law may result in such persons being unable to pay their rent, thus making them subject to eviction; that such hardships fall with particular severity upon older persons in the population because of their particular inability to find alternative accommodations within their means, because of the trauma experienced by many older persons who have to relocate and because they may endanger their health by paying additional sums for shelter and thereby deprive themselves of other necessities; that hardships imposed upon such people adversely affect their health and welfare and the general welfare of the inhabitants of the city. The council is aware of the provisions set forth in chapter three hundred seventy-two and chapter one thousand twelve of the laws of nineteen hundred seventy-one. It is our considered opinion that this legislation extending the rent exemption to cover the resultant rent increases due to the

maximum rents established January first, nineteen hundred seventy-two is not more stringent or restrictive than those presently in effect. It is, therefore, found and declared to be necessary for the health, welfare and safety of such persons and of inhabitants of the city that the city continue a system of special rent adjustments for such persons as hereinafter provided.

(1) No increase in maximum rent pursuant to paragraph two or paragraph three, four or five of subdivision a of this section, or subparagraph (a), (b), (c), (1) or (l) of paragraph one of subdivision g of this section, shall be collectible from a tenant to whom there has been issued a currently valid rent exemption order pursuant to this subdivision, except as provided in such order.

(2) A tenant is eligible for a rent exemption order pursuant to this subdivision if:

(i) the head of the household residing in the housing accommodation is sixty-two years of age or older and is entitled to the possession or to the use or occupancy of a dwelling unit.

(ii) The aggregate disposable income (as defined by regulation of the department of housing preservation and development) of all members of the household residing in the housing accommodation does not exceed fifteen thousand dollars per year, after deduction of federal, state and city income and social security taxes. For purposes of

this subdivision, "aggregate disposable income" shall not include increases in benefits accorded pursuant to the social security act which take effect after the date of eligibility of a head of the household receiving benefits under this subdivision whether received by the head of the household or any other member of the household; and

(iii) (a) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, the maximum rent for the housing accommodations exceeds one-third of the aggregate disposable income or if any expected increase in the maximum rent pursuant to paragraph two, three, four or five of subdivision a of this section, or subparagraph (a), (b), (c), (1) or (n) of paragraph one of subdivision g of this section would cause such maximum rent to exceed one-third of the aggregate disposable income; or

(b) in the case of a head of the household who receives a monthly allowance for shelter pursuant to the social services law, the maximum rent for the housing accommodations exceeds the maximum allowance for shelter which the head of the household is entitled to receive pursuant to the social services law or if any expected increase in the maximum rent pursuant to paragraph two, three, four or five of subdivision a of this section, or subparagraph (a), (b), (c), (1) or (n) of paragraph one of subdivision g of this section would cause such maximum rent to exceed the maximum allowance for

shelter which the head of the household is entitled to receive.

(3) (a) A rent exemption order pursuant to this subdivision shall provide:

(i) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social law services law, that the landlord may not collect from the tenant to whom it is issued rent at a rate in excess of one-third of the aggregate disposable income, or the maximum collectible rent in effect on December thirty-first of the year preceding the effective date of the order, whichever is greater; or

(ii) in the case of a head of the household who receives a monthly allowance for shelter pursuant to the social services law, that the landlord may not collect from the tenant to whom it is issued rent at a rate in excess of either the maximum allowance for shelter which the head of the household is entitled to receive, or the maximum collectible rent in effect on December thirty-first of the year preceding the effective date of the order, whichever is greater; except,

(iii) that the landlord may collect from the tenants described in items (i) and (ii) of this subparagraph increases in rent pursuant to subparagraphs (d), (e), and (i) of paragraph one of subdivision g of this section.

(b) Each such order shall expire upon termination of occupancy of the housing accommodation by the tenant to whom it is issued. The landlord shall notify the department of housing preservation and development, on a form to be prescribed by such department, within thirty days of each such termination of occupancy.

(4) Any landlord who collects, or seeks to collect or enforce, rent from a tenant in violation of the terms of a rent exemption order shall, for the purposes of all remedies, sanctions and penalties provided in this chapter, be deemed to have collected or attempted to collect or enforce, a rent in excess of the legal maximum rent.

(5) A rent exemption order shall be issued to each tenant who applies to the New York City department of housing preservation and development in accordance with its regulations and who is found to be eligible under this subdivision. Such order shall take effect on the first day of the first month after receipt of such application, except that where the aggregate disposable income of all members of the household residing in the housing accommodation is greater than five thousand dollars per year but does not exceed fifteen thousand dollars per year pursuant to subparagraph (ii) of paragraph two of this subdivision m of this section on orders issued on applications received before July first, nineteen hundred seventy-five, the effective date of such order shall be the later of (1) June thirty, nineteen hundred seventy-four or (2) the last day of the month in which a person becomes an

eligible head of household in the housing accommodation in which such person resides at the time of filing the most recent application for a rent exemption order; and further, except that where any other application has been received within ninety days of the issuance of the order increasing the tenant's maximum rent pursuant to paragraph three, four or six of subdivision (a) of this section, or subparagrah (a), (b), (c) or (l) of paragraph (1) of subdivision (g) of this section or pursuant to court order, whichever is later, the rent exemption order shall without further order take effect as of the effective date of said order increasing the tenant's rent including any retroactive increments collectible pursuant to such orders.

(6) A rent exemption order shall be valid for a period of two years and may be renewed for further two year periods upon application by the tenant; provided, that upon any such renewal application being made by the tenant, any rent exemption order then in effect with respect to such tenant shall be deemed renewed until such time as the department of housing preservation and development shall have found such tenant to be either eligible or ineligible for a rent exemption order but in no event for more than six additional months. If such tenant is found eligible, the order shall be deemed to have taken effect upon expiration of the exemption. In the event that any such tenant shall, subsequent to any such automatic renewal, not be granted a rent exemption order, such tenant shall be liable to his or her landlord for the difference between the amounts he or she has paid under the

provisions of the automatically renewed order and the amounts which he or she would have been required to pay in the absence of such order. Any rent exemption order issued pursuant to this subdivision shall include provisions giving notice as to the contents of this paragraph relating to automatic renewals of rent exemption orders. Any application or renewal application for a rent exemption order shall also constitute an application for a tax abatement under such section. The department of housing preservation and development may, with respect to renewal applications by tenants whom it has found eligible for rent exemption orders, prescribe a simplified form including a certification of the applicant's continued eligibility in lieu of a detailed statement of income and other qualifications.

(7) Notwithstanding the provisions of this chapter, a tenant who resides in a housing accommodation which becomes subject to this chapter upon the sale by the city of New York of the building in which such housing accommodation is situated may be issued a rent increase exemption order for increases in rent which occurred during ownership of such building by the city of New York provided that such tenant would have been otherwise eligible to receive a rent increase exemption order at the time of such increase but for the fact that such tenant occupied a housing accommodation owned by the city of New York and was therefore not subject to this chapter. Application for such rent increase exemption orders shall be made within one year from the date such building is sold

by the city of New York or within one year of the effective date of this provision, whichever is later.

(8) Notwithstanding the provisions of this chapter or chapter four of this title, when a dwelling unit is subject to regulation under this chapter or chapter four of this title is reclassified by a city rent agency order subject to the other chapter, the tenant, who holds a senior citizen rent increase exemption order at the time of the reclassification or is otherwise eligible and entitled to an exemption order from one or more rent increases but for the reclassification of the dwelling unit, may be issued a rent increase exemption order under the chapter to which the unit is thereafter subject by virtue of the reclassification continuing the previous exemption notwithstanding the reclassification of the dwelling unit or, where no previous rent increase exemption order has been granted, issuing an initial order exempting the tenant from paying the rent increase to the extent for which he or she would have been eligible and entitled to be exempted at the time of the increase and reclassification but for the fact of reclassification of the dwelling unit including exemption from the rent increase granted pursuant to subparagraph (m) of paragraph one of subdivision g of this section to the extent that it is not predicated upon any improvement or addition in a category as provided for in subparagraph (d), (e), (f), (g), (h) or (i) of paragraph one of subdivision g of this section. Application for such rent increase exemption order shall be made within ninety days from the date of reclassification or within ninety days of the effective date

of this paragraph, whichever is later. The rent increase exemption order shall take effect as of the effective date of reclassification including any retroactive increments pursuant to such rent increase.

(9) notwithstanding any other provision of law to the contrary, where a head of household holds a current, valid rent exemption order and, after the effective date of this paragraph, there is a permanent decrease in aggregate disposable income in an amount which exceeds twenty percent of such aggregate disposable income as represented in such head of the household's last approved application for a rent exemption order or for renewal thereof, such head of the household may, upon renewal or one year after the issuance or renewal of such rent exemption order, apply for a redetermination of the amount set forth therein. Upon application, such amount shall be redetermined so as to re-establish the ratio of adjusted rent to aggregate disposable income which existed at the time of the approval of such eligible head of the household's last application for a rent exemption order or for renewal thereof; provided, however, that in no event shall the amount of the adjusted rent be redetermined to be (i) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, less than one-third of the aggregate disposable income; or (ii) in the case of a head of the household who receives a monthly allowance for shelter pursuant to the social services law, less than the maximum allowance for shelter which such head of the household is entitled to receive pursuant to such

law. For purposes of this paragraph, a decrease in aggregate disposable income shall not include any decrease in such income resulting from the manner in which such income is calculated pursuant to any amendment to paragraph c of subdivision one of section four hundred sixty-seven-b of the real property tax law or any amendment to the regulations of the department of housing preservation and development made on or after April first, nineteen hundred eighty-seven. For purposes of this paragraph, "adjusted rent" shall mean maximum rent less the amount set forth in a rent exemption order.

NEW YORK CITY ADMINISTRATIVE CODE
SECTION 26-406

Tax abatement for properties subject to rent exemption orders. a. Tax abatement, pursuant to the provisions of section four hundred sixty-seven-b of the real property tax law, shall be granted with respect to any real property for which a rent exemption order is issued under subdivision n of section 26-405 of this chapter to the tenant of any housing accommodation contained therein. The rent exemption order shall also constitute the tax abatement certificate.

b. The real estate tax imposed upon any real property for which a rent exemption order is issued, shall be reduced and abated by an amount equal to the difference between (1) the sum of the maximum rents collectible under such orders, and (2) the sum of rents that would be collectible from the tenants of such housing accommodations if no exemption had been granted pursuant to subdivision n of section 26-405 of this chapter.

c. For any individual housing accommodation, the tax abatement computed pursuant to subdivision b of this section shall be available with respect to a period commencing on the effective date of the initial rent exemption order, or January first, nineteen hundred seventy-two, whichever is later, and ending on the expiration date of such order or on the effective date of an order terminating the rent exemption. Notwithstanding any other

provision of law, when a head of a household to whom a then current, valid tax abatement certificate has been issued under this chapter, chapter four or chapter seven of this title moves his or her principal residence to a subsequent dwelling unit subject to regulation under this chapter, the head of the household may apply to the department, of housing preservation and development for a tax abatement certificate relating to the subsequent dwelling unit, and such certificate may provide that the head of the household shall be exempt from paying that portion of the maximum rent for the subsequent dwelling unit which is the least of the following:

(1) the amount by which the rent for the subsequent dwelling unit exceeds the last rent, as reduced, which the head of the household was required to actually pay in the original dwelling unit;

(2) the last amount deducted from the maximum rent or legal regulated rent meaning the most recent monthly deduction for the applicant in the original dwelling unit pursuant to this section, section 26-509 or section 26-605 of this title; or

(3) where the head of the household does not receive a monthly allowance for shelter pursuant to the social services law, the amount by which the maximum rent or legal regulated rent of the subsequent dwelling unit exceeds one-third of the combined income of all members of the household.

Such certificate shall be effective as of the first day of the month in which the tenant applied for such exemption or as of the date the tenant took occupancy of the subsequent dwelling unit, whichever is later, provided both occur after the effective date of this law.

d. Prior to the commencement of each fiscal year, the department of housing preservation and development shall notify the department of finance of the total amount of taxes to be abated under this section with respect to each property for which rent exemption orders were in effect for all or any part of the preceding calendar year. The commissioner of finance shall make the appropriate adjustment in the real estate tax payable in such fiscal year.

e. Tax abatement pursuant to this section shall be in addition to any other tax abatement authorized by law, but shall not reduce the tax for any fiscal year below zero. In the event that the tax abatement certificate authorizes an amount of deduction in excess of the real estate installment, then the balance may be applied to any subsequent installment until exhausted. In such a case the owner shall submit with his or her real estate tax bill and remittance, a verified statement in such form as prescribed by the commissioner of finance setting forth the carry over amount and the amounts previously applied; provided, however, that at the request of the owner such balance shall be paid to the owner by the commissioner of finance in lieu of being applied to any subsequent installment, except where the

owner is in arrears in the payment of real estate taxes on any property. For the purposes of this subdivision, where the owner is a corporation, it shall be deemed to be in arrears when any of the officers, directors or any person holding an interest in more than ten percent of the issued and outstanding stock of such corporation is in arrears in the payment of real estate taxes on any property; where title is held by a nominee, the owner shall be deemed to be in arrears when the person for whose benefit such title is held is in arrears in the payment of real estate taxes on any property.

NEW YORK CITY ADMINISTRATIVE CODE
SECTION 26-509

Application to department of housing preservation and development for rent increase exemptions and equivalent tax abatement for rent regulated property occupied by certain senior citizens. a. Commencement of department of housing preservation and development jurisdiction.

(1) Notwithstanding any provisions of this chapter to the contrary, on and after October first, nineteen hundred eighty, the department of housing preservation and development shall grant rent increase exemption orders or tax abatement certificates pursuant to this section and applications for such orders and certificates and renewal applications shall be made to the department of housing preservation and development.

(2) The department of housing preservation and development shall have the power, in relation to any application for a rent increase exemption order or tax abatement certificate, to determine the lawful stabilization rent, but it shall not receive applications for adjustment of the initial legal regulated rent pursuant to section 26-513 of this chapter.

(3) The department of finance, and the department of housing preservation and development may

promulgate such rules and regulations as may be necessary to effectively carry out the provisions of this section.

b. Rent increase exemptions for certain senior citizens.

(1) No increase in the legal regulated rent shall be collectible from a tenant to whom there has been issued a currently valid rent exemption order pursuant to this subdivision, except as provided in such order, if such increase is a lawful increase in the monthly legal regulated rent over the rent legally payable on the eligibility date which is provided under a two year lease, or under such other term as regards dwelling units subject to the hotel stabilization provisions of this chapter, for an increase in rent:

(i) pursuant to an order of the New York city rent guidelines board, or

(ii) based upon an owner hardship rent increase order issued by the state division of housing and community renewal.

(2) A tenant is eligible for a rent exemption order pursuant to this section if:

(i) the head of the household residing in the housing accommodation is sixty-two years of age or older

and is entitled to the possession or to the use or occupancy of a dwelling unit.

(ii) the aggregate disposable income (as defined by regulation of the department of housing preservation and development) of all members of the household residing in the housing accommodation does not exceed fifteen thousand dollars per year, after deduction of federal, state and city income and social security taxes. For purposes of this subdivision, "aggregate disposable income" shall not include increases in benefits accorded pursuant to the social security act which take effect after the eligibility date of a head of the household receiving benefits under this section whether received by the head of the household or any other member of the household.

(iii) (a) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, the maximum rent for the housing accommodation exceeds one-third of the aggregate disposable income, or subject to the limitations contained within item (c) of subparagraph (i) of paragraph three of this subdivision, if any expected lawful increase in the maximum rent would cause such maximum rent to exceed one-third of the aggregate disposable income; or

(b) in the case of a head of the household who receives a monthly allowance for shelter pursuant to the social services law, the maximum rent for the housing accommodation exceeds the maximum allowance for shelter

which the head of the household is entitled to receive pursuant to the social services law, or subject to the limitations contained within item (c) of subparagraph (i) of paragraph three of this subdivision, if any expected lawful increase in the maximum rent would cause such maximum rent to exceed the maximum allowance for shelter which the head of the household is entitled to receive.

(3) (i) A rent exemption order pursuant to this subdivision shall provide:

(a) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, that the landlord may not collect from the tenant to whom it is issued rent at a rate in excess of either one-third of the aggregate disposable income, or the rent in effect immediately preceding the eligibility date, whichever is greater; or

(b) in the case of a head of the household who receives a monthly allowance for shelter pursuant to the social services law, that the landlord may not collect from the tenant to whom it is issued rent at a rate in excess of either the maximum allowance for shelter which the head of the household is entitled to receive, or the rent in effect immediately preceding the eligibility date, whichever is greater; and

(c) that the landlord may collect from the tenant increases in rent based on an electrical inclusion adjustment or an increase in dwelling space, services or equipment.

(ii) Each such order shall expire upon termination of occupancy of the housing accommodation by the tenant to whom it is issued. The landlord shall notify the department of housing preservation and development, on a form to be prescribed by such department, within thirty days of each such termination of occupancy.

(4) Any landlord who collects, or seeks to collect or enforce, rent from a tenant in violation of the terms of a rent exemption order shall, for the purposes of all remedies, sanctions and penalties provided in this chapter, be deemed to have collected or attempted to collect or enforce, a rent in excess of the legal regulated rent.

(5) A rent exemption order shall be issued to each tenant who applies to the department of housing preservation and development in accordance with its regulations and who is found to be eligible under this subdivision. Such order shall take effect on the first day of the first month after receipt of such application by the department of housing preservation and development, except that where any other increase in the legal regulated rent within ninety days of the issuance of the order increasing the tenant's maximum rent which a tenant is not exempted from paying the rent exemption order shall without further order of the department of housing

preservation and development take effect as of the effective date of said order increasing the tenant's rent including any retroactive increments collectible pursuant to such order.

(6) A rent exemption order shall be valid for the period of the lease or renewal thereof upon application by the tenant; provided, that upon any such renewal thereof upon application by the tenant; provided that upon any such renewal application being made by the tenant, any rent exemption order then in effect with respect to such tenant shall be deemed renewed until such time as the department of housing preservation and development shall have found such tenant to be either eligible or ineligible for a rent exemption order but in no event for more than six additional months. If such tenant is found eligible, the order shall be deemed to have taken effect upon expiration of the exemption. In the event that any such tenant shall, subsequent to any such automatic renewal, not be granted a rent exemption order, such tenant shall be liable to the owner for the difference between the amounts the tenant has paid under the provisions of the automatically renewed order and the amounts which the tenant would have been required to pay in the absence of such order. Any rent exemption order issued pursuant to this subdivision shall include provisions giving notice as to the contents of this paragraph relating to automatic renewals of rent exemption orders and shall include provisions giving notice that the tenant must enter into either a one or two year renewal lease in order to be eligible for a rent exemption. The notice that each tenant receives from the owner relating to

the right to a renewal lease shall contain similar information. Any application or renewal application for a rent exemption order shall also constitute an application for a tax abatement under such section. The department of housing preservation and development may, with respect to renewal applications by the tenants whom it has found eligible for rent exemption orders, prescribe a simplified form including a certification of the applicant's continued eligibility in lieu of a detailed statement of income and other qualifications.

(7) Notwithstanding any other provision of law, when a head of a household to whom a then current, valid rent exemption order has been issued under this chapter, chapter three or chapter seven of this title moves his or her principal residence to a subsequent dwelling unit subject to regulation under this chapter, the head of the household may apply to the department of housing preservation and development for a rent exemption order relating to the subsequent dwelling unit, and such order may provide that the head of the household shall be exempt from paying that portion of the legal regulated rent for the subsequent dwelling unit which is the least of the following:

(i) the amount by which the rent for the subsequent dwelling unit exceeds the last rent, as reduced, which the head of the household was required to actually pay in the original dwelling unit;

(ii) the last amount deducted from the maximum rent or legal regulated rent meaning the most recent monthly deduction for the applicant in the original dwelling unit pursuant to this section or section 26-605 of this title; or

(iii) where the head of the household does not receive a monthly allowance for shelter pursuant to the social services law, the amount by which the legal regulated rent of the subsequent dwelling unit exceeds one-third of the combined income of all members of the household.

Such certificate shall be effective as of the first day of the month in which the tenant applied for such exemption or as of the date the tenant took occupancy of the subsequent dwelling unit, whichever is later provided both occur after the effective date of this section.

(8) (i) When a dwelling unit subject to regulation under this chapter is later reclassified to a dwelling unit subject to regulation under chapter three of this title, the eligibility of a head of the household to receive a rent increase exemption order upon such reclassification shall be governed by paragraph eight of subdivision m of section 26-405 of this title.

(ii) When a dwelling unit subject to regulation under this chapter is later reclassified to a dwelling unit to the provisions of article II, IV, V or XI of the private housing finance law or subject to a mortgage insured or

initially insured by the federal government pursuant to section two hundred thirteen of the national housing act, as amended, the eligibility of a head of the household to receive a rent increase exemption order upon such reclassification shall be governed by section 26-605.1 of this title.

(9) notwithstanding any other provision of law to the contrary, where a head of household holds a current, valid rent exemption order and, after the effective date of this paragraph, there is a permanent decrease in aggregate disposable income in an amount which exceeds twenty percent of such aggregate disposable income as represented in such head of the household's last approved application for a rent exemption order or for renewal thereof, such head of the household may, upon renewal or one year after the issuance or renewal of such rent exemption order, apply for a redetermination of the amount set forth therein. Upon application, such amount shall be redetermined so as to re-establish the ratio of adjusted rent to aggregate disposable income which existed at the time of approval of such head of the household's last application for a rent exemption order or for renewal thereof; provided, however, that in no event shall that amount of adjusted rent be redetermined to be (i) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, less than one-third of the aggregate disposable income; or (ii) in the case of a head of the household who receives a monthly allowance for shelter pursuant to law, less than the maximum allowance for

shelter which such head of the household is entitled to receive pursuant to the social services law. For purposes of this paragraph, a decrease in aggregate disposable income shall not include any decrease in such income resulting from the manner in which such income is calculated pursuant to any amendment to paragraph c of subdivision one of section four hundred sixty-seven-b of the real property tax law or any amendment to the regulations of the department of housing preservation and development made on or after April first, nineteen hundred eight-seven. For purposes of this paragraph, "adjusted rent" shall mean legal regulated rent less the amount set forth in a rent exemption order.

c. Tax abatement for properties subject to rent exemption order.

(1) Tax abatement, pursuant to the provisions of section four hundred sixty-seven-b of the real property tax law, shall be granted with respect to any real property for which a rent exemption order is issued under subdivision b of this section to the tenant of any housing accommodation contained therein. The rent exemption order shall also constitute the tax abatement certificate.

(2) The real estate tax imposed upon any real property for which a rent exemption is issued, shall be reduced and abated by an amount equal to the difference between:

(i) the sum of the maximum rents collectible under such orders, and

(ii) the sum of rents that would be collectible from the tenants of such housing accommodations if no exemption had been granted pursuant to subdivision b of this section.

(3) For any individual housing accommodation, the tax abatement computed pursuant to this subdivision shall be available with respect to a period commencing on the effective date of the initial rent exemption order, and ending on the expiration date of such order or on the effective date of an order terminating the rent exemption.

(4) Prior to the commencement of each fiscal year, the department of housing preservation and development shall notify the department of finance of the total amount of taxes to be abated under this section with respect to each property for which rent exemption orders were in effect for all or any part of the preceding calendar year. The commissioner of finance shall make the appropriate adjustment in the real estate tax payable in such fiscal year.

(5) Tax abatement pursuant to this section shall be in addition to any other tax abatement authorized by law, but shall not reduce the tax for any fiscal year below zero. In the event that the tax abatement certificate authorizes an

amount of deduction in excess of the real estate installment, then the balance may be applied to any subsequent installment until exhausted. In such a case the owner shall submit with his or her real estate tax bill and remittance, a verified statement in such form as prescribed by the commissioner of finance setting forth the carry over amount and the amounts previously applied; provided, however, that at the request of the owner such balance shall be paid to the owner by the commissioner of finance in lieu of being applied to any subsequent installment, except where the owner is in arrears in the payment of real estate taxes on any property. For the purposes of this paragraph, where the owner is a corporation, it shall be deemed to be in arrears when any of the officers, directors or any person holding an interest in more than ten percent of the issued and outstanding stock of such corporation is in arrears in the payment of real estate taxes on any property; where title is held by a nominee, the owner shall be deemed to be in arrears when the person for whose benefit such title is held is in arrears in the payment of real estate taxes on any property.

d. Notwithstanding the provisions of this chapter, a tenant who resides in a dwelling unit which becomes subject to this chapter upon the sale by the city of New York of the building in which such dwelling unit is situated may be issued a rent increased exemption order for increases in rent which occurred during ownership of such building by the city of New York provided that such tenant would have been otherwise eligible to receive a rent

increase exemption order at the time of such increase but for the fact that such tenant occupied a dwelling unit owned by the city of New York and was therefore not subject to this chapter. Application for such rent increase exemption orders shall be made within one year from the date such building is sold by the city of New York or within one year of the effective date of this provision, whichever is later.

NEW YORK REAL PROPERTY TAX LAW
SECTION 467-b

Tax abatement for rent-controlled and rent regulated property occupied by senior citizens

1. Definitions. As used in this section:

a. "Dwelling unit" means that part of a dwelling in which a head of the household resides and which is subject to either the emergency housing rent control law or to the rent and rehabilitation law of the city of New York enacted pursuant to the local emergency housing rent control law, or to the emergency tenant protection act of nineteen seventy-four;

b. "Head of the household" means a person who is sixty-two years of age or older and is entitled to the possession or to the use or occupancy of a dwelling unit;

c. "Income" means income from all sources after deduction of all income and social security taxes and includes social security and retirement benefits, supplemental security income additional state payments, public assistance benefits, interest, dividends, net rental income, salary or earnings, and new income from self-employment, but shall not include gifts or inheritances, or increases in benefits accorded pursuant to the social security act which take effect after the date of eligibility of head of

the household receiving benefits hereunder whether received by the head of the household or any other member of the household;

d. "Income tax year" means a twelve month period for which the head of the household filed a federal personal income tax return, or if no such return is filed, the calendar year;

e. "Increase in maximum rent or legal regulated rent" means any increase in the maximum rent or the legal regulated rent for the dwelling unit in question pursuant to the applicable rent control law or to the emergency tenant protection act of nineteen seventy-four, respectively, or such classes of increase thereunder as may be specified in a local law, ordinance or resolution enacted pursuant to this section, over such base period rent as shall be provided therein or an exemption from the maximum rent or legal regulated rent as specified in paragraph c or d of subdivision three of this section;

f. "Members of the household" means the head of the household and any person, other than a bona fide roomer, boarder or subtenant who is not related to the head of the household, permanently residing in the dwelling unit.

2. The governing body of any municipal corporation is hereby authorized and empowered to adopt, after public hearing, in accordance with the provisions of this section, a local law, ordinance or resolution providing

for the abatement of taxes of said municipal corporation imposed on real property containing a dwelling unit as defined herein by one of the following amounts: (a) where the head of the household does not receive a monthly allowance for shelter pursuant to the social services law, an amount not in excess of that portion of any increase in maximum rent or legal regulated rent which causes such maximum rent or legal regulated rent to exceed one-third of the combined income of all members of the household; or

(b) where the head of the household receives a monthly allowance for shelter pursuant to the social services law, an amount not in excess of that portion of any increase in maximum rent or legal regulated rent which is not covered by the maximum allowance for shelter which such person is entitled to receive pursuant to the social services law.

3. Any such local law, ordinance or resolution shall provide that:

a. no tax abatement shall be granted if the combined income of all members of the household for the income tax year immediately preceding the date of making application exceeds four thousand dollars, or such other sum not more than fifteen thousand dollars as may be provided by the local law, ordinance or resolution adopted pursuant to this section, provided that when the head of the household retires before the commencement of such year and the date of filing the application, the income for such

year may be adjusted by excluding salary or earnings and projecting his retirement income over the entire period of such year.

b. upon issuance of a tax abatement certificate as provided in subdivision four of this section, the amount set forth in said certificate shall be deducted from the legal maximum rent or legal regulated rent chargeable for a dwelling unit of a head of the household.

c. notwithstanding any other provision of law, when a head of the household to whom a then current, valid tax abatement certificate has been issued moves his principal residence from one dwelling unit to a subsequent dwelling unit located within the same municipal corporation, the head of the household may apply for a tax abatement certificate relating to the subsequent dwelling unit, and such certificate may provide that the head of the household shall be exempt from paying that portion of the maximum rent or legal regulated rent for the subsequent dwelling unit which is the least of the following:

(1) the amount by which the rent for the subsequent dwelling unit exceeds the last rent, as reduced; which the head of the household was required to actually pay in the original dwelling unit;

(2) the last amount deducted from the maximum rent or legal regulated rent pursuant to this section in the original dwelling unit; or

(3) where the head of the household does not receive a monthly allowance for shelter pursuant to the social services law, the amount by which the maximum rent or legal regulated rent of the subsequent dwelling unit exceeds one-third of the combined income of all members of the household.

d. notwithstanding any other provision of law, when a head of the household to whom a then current, valid tax abatement certificate has been issued moves his principal residence from one dwelling unit subject to the provisions of articles II, IV, V or XI of the private housing finance law to a subsequent dwelling unit subject to either the local emergency housing rent control law or to the emergency tenant protection act of nineteen seventy-four which is located within the same municipal corporation, the head of the household may apply for a tax abatement certificate relating to the subsequent dwelling unit, and such certificate may provide that the head of the household shall be exempt from paying that portion of the maximum rent or legal regulated rent for the subsequent dwelling unit which is the least of the following:

(1) the amount by which the rent for the subsequent dwelling unit exceeds the last rent, as so reduced, which the head of the household was required to actually pay in the original dwelling unit;

(2) the most recent amount so deducted from the maximum rent or legal regulated rent in the original dwelling unit; or

(3) where the head of the household does not receive a monthly allowance for shelter pursuant to the social services law, the amount by which the maximum rent or legal regulated rent of the subsequent dwelling unit exceeds one-third of the combined income of all members of the household.

e. notwithstanding any other provision of law, when a dwelling unit subject to regulation under the New York city rent and rehabilitation law or the rent stabilization law of the city of New York is reclassified by order of the city rent agency subject to the other law, a head of the household who held a valid senior citizen rent increase exemption order under the appropriate law continuing the exemption he would have been eligible and entitled to, notwithstanding such reclassification of such dwelling unit and the tenant shall be exempt from paying the rent increase to the extent to which he was otherwise eligible and entitled to be exempted at the time of the increase but for the fact of such reclassification of the dwelling unit including exemption from the rent increase granted pursuant to subparagraph (m) of paragraph one of subdivision g of section Y51-5.0 of the administrative code of the city of New York to the extent that it is not predicated upon any improvement or addition in a category as provided for in subparagraph (d), (e), (f), (g), (h) or (i) of such paragraph.

(1) A head of the household who is otherwise eligible for exemption at the time of the rent increase and resides in a dwelling unit subject to regulation under the emergency housing rent control law or the rent stabilization law of the city of New York which has been reclassified under the other law, may be issued a rent increase exemption order under the appropriate law exempting the tenant from paying the rent increase to the extent to which he would have been eligible and entitled to be exempted but for the fact of reclassification of the dwelling units including exemption from the rent increase granted pursuant to subparagraph (m) of paragraph one of subdivision g of section Y51-5.0 of the administrative code of the city of New York to the extent that it is not predicated upon any improvement or addition in a category as provided for in subparagraph (d), (e), (f), (g), (h) or (i) of such paragraph.

(2) Application for an exemption order shall be made within ninety days from the date of the rent increase and reclassification or within ninety days of the effective date of this paragraph, whichever is later, and the rent increase exemption order shall take effect as of the effective date of the rent increase and reclassification including any retroactive increments pursuant to such rent increase.

f. notwithstanding any other provision of law to the contrary, where a head of the household holds a current, valid tax abatement certificate and, after the effective date of this paragraph, there is a permanent decrease in the combined income of all members of the

household in an amount which exceeds twenty percent of such income as represented in such head of the household's last approved application for a tax abatement certificate or for renewal thereof, such head of the household may, upon renewal or one year after the issuance or renewal of such tax abatement certificate, apply for a redetermination of the amount set forth therein. Upon application, such amount shall be redetermined so as to re-establish the ration of adjusted rent to income which existed at the time of approval of such head of household's last application for a tax abatement certificate or for renewal thereof; provided, however, that in no event shall the amount of the adjusted rent be redetermined to be (i) in the case of a head of the household who does not receive a monthly allowance for shelter pursuant to the social services law, less than one-third of the combined income of all members of the household; or (ii) in the case of a head of the household who receives a monthly allowance for shelter pursuant to the social services law, less than the maximum allowance for shelter which such head of the household is entitled to receive pursuant to such law. For purposes of this paragraph, a decrease in the combined income of all members of the household shall not include any decrease in such income resulting from the manner in which income is calculated pursuant to any amendment to paragraph c of subdivision one of this section made on or after April first, nineteen hundred eighty-seven. For purposes of this paragraph, "adjusted rent" shall mean maximum rent or legal regulated rent less the amount set forth in a tax abatement certificate.

4. The head of the household must apply every two years to the appropriate rent control agency or administrative agency for a tax abatement certificate on a form prescribed by said agency. A tax abatement certificate setting forth an amount not in excess of the increase in maximum rent or legal regulated rent for the taxable period or such other amount as shall be determined under subdivision three of this section shall be issued by said agency to each head of the household who is found to be eligible under this section on or before the last date prescribed by law for the payment of the taxes or the first installment thereof of any municipal corporation which has granted an abatement of taxes. Copies of such certificate shall be issued to the owner of the real property containing the dwelling unit of the head of the household and to the collecting officer charged with the duty of collecting the taxes of each municipal corporation which has granted the abatement of taxes authorized by this section.

5. Eligibility shall be determined as of a date prescribed by the appropriate rent control agency or administrative agency pursuant to the local law, ordinance or resolution and such local law, ordinance or resolution may provide for a pro rata refund of taxes paid prior to such eligibility date or a credit therefor against the next succeeding tax periods.

6. The amount set forth in a tax abatement certificate shall be deducted from the total taxes levied by or on behalf of the municipal corporation which has granted

such abatement on real property containing the dwelling unit of a head of the household to whom the certificate has been issued. In the event that both a town and a village included therein grant such abatement, such deduction for properties located in the village shall be made first from taxes levied by or on behalf of the village and any excess thereof shall be deducted from town taxes.

7. Upon the vacancy of a dwelling unit for which an abatement certificate has been issued, the owner thereof shall remit a pro rata portion of the tax abatement to the collecting officer of the municipal corporation which granted such abatement and any amount due by reason of such vacancy shall be lien upon the property on and after the date of such vacancy.

8. Where a tax abatement certificate has been issued to a head of the household as authorized by a local law, ordinance or resolution adopted pursuant to this section and the landlord collects or attempts to collect all or part of the amount covered by such tax abatement certificate, the amount of such abatement shall be deemed a rent overcharge under the applicable rent control or rent regulation law.

9. In a city with a population of one million or more, any such local law, ordinance or resolution may provide that in the event the abatement certificate authorizes an amount of deduction in excess of the real estate quarterly installment, then the balance may be applied to

any subsequent installment until exhausted, provided that, at the request of the owner, such balance shall be paid to he owner in lieu of being applied to any subsequent installment, except where the owner is in arrears in the payment of real estate taxes on any property. For the purposes of such provision of any such local law, ordinance or resolution, where the owner is a corporation, it shall be deemed to be in arrears when any officer, director or any person holding an interest in more than ten percent of the issued and outstanding stock of such corporation is in arrears in the payment of real estate taxes on any property; where title is held by a nominee, the owner shall be deemed to be in arrears when the person for whose benefit such title is held is in arrears in the payment of real estate taxes on any property.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 92-293

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and
NEW YORK CITY DEPARTMENT OF FINANCE,

Petitioners,

- against -

BARBARA KRAEBEL d/b/a
BARKLEE REALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the right to a post-deprivation state court proceeding in itself satisfies federal due process when institutionalized state conduct is at issue?

2. Whether Section 1983 of Title 42 of the United States Code permits federal courts to consider federal due process claims even if state courts provide legal recourse for such claims?

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IN THE
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No. 92-293

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and NEW YORK CITY DEPARTMENT OF FINANCE,

Petitioners,

- against -

BARBARA KRAEBEL d/b/a BARKLEE REALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Among other causes of action, Respondent brought this proceeding under 42 U.S.C. Sec. 1983, alleging that the Senior Citizen Rent Increase Exemption Program (hereinafter described) administered by Petitioners violates Respondent's federal due process rights. The District Court dismissed said claim under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The District Court decision, which was not officially reported, appears App. 30-45*.

The Court of Appeals reversed said dismissal and remanded the proceeding for consideration of said due process claim. The Court of Appeals decision is officially reported as Kraebel v. Dept. of Housing Pres. & Dev., 959 F.2d 395 (2d Cir. 1992) and appears at App. 1-27.

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* Numbers after App. refer to pages in the Appendix To Petition For A Writ Of Certiorari.

ADDITIONAL RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions:

Fifth Amendment, United States Constitution
(Appendix A hereto, p. A-1)

Fourteenth Amendment, Section 1,
United States Constitution
(Appendix B hereto, p. A-2)

Statutory Provision:

United States Code,
Title 42, Section 1983
(Appendix C hereto, p. A-3).

COUNTERSTATEMENT OF THE CASE

The Senior Citizen Rent Increase Exemption, or SCRIE, Program exempts senior citizen tenants with incomes below a specified amount from paying rent increases. Instead, property owners with SCRIE tenants are entitled to real estate tax abatements equal to such exempt rents. If such tax abatements exceed the real estate taxes on the property in question, Petitioners are required to pay the excess in cash upon request of the property owner. New York Real Property Tax Law, Sec. 467-b, appearing App. 104-114; New York City Administrative Code, Secs. 26-405[m], 26-406 and 26-509, appearing App. 77-103.

Petitioners' descriptions of the SCRIE Program and the Amended Complaint in their Statement Of The Case are substantially accurate, but the descriptions of the decisions below are inaccurate in the following significant respects:

Petitioners imply that Respondent's SCRIE claim was dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction as well as under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted (Pet. 5*). Rule 12(b)(1) was not the basis for dismissing Respondent's claims regarding the SCRIE Program; it was the basis only for the District Court's dismissal of Respondent's claims regarding a separate program administered by Petitioners, which dismissal was

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* Numbers after Pet. refer to pages in the Petition For A Writ Of Certiorari.

upheld by the Court of Appeals and is not before this Court (App. 44-45, 9).

The District Court did not refer to Parratt v. Taylor, 451 U.S. 527 (1981) as the grounds for dismissing Respondent's due process claims with respect to the SCRIE Program (App. 40-42).

The Court of Appeals reinstated all of Respondent's due process claims with respect to the SCRIE Program, not just the issue of delay (App. 26-27).

REASONS FOR DENYING THE WRIT

A. The Right To A Post-Deprivation State Court Proceeding Does Not In Itself Satisfy Federal Due Process As To Violations Arising From Institutionalized Government Conduct.

Petitioners characterize Respondent's claims as being "simply" that Petitioners took too long to act on Respondent's application for payment of SCRIE rents. Petitioners state that Respondent has only alleged a chronology of events with a conclusion that the Petitioners' delay was too long (Pet. 1, 12).

These characterizations are not consistent with the pleadings (App. 58-60 pars. 32-41) nor with Petitioners' own description of Respondent's allegations (Pet. 4-5). The Court of Appeals explicitly rejected such characterizations (App. 22-23).

Based on their misdescription of Respondent's claims, Petitioners argue (Pet. 12-13) that the Court of Appeals's decision runs counter to Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), which held that a nine-month delay in holding an administrative hearing to determine whether a government employee dismissed for cause was entitled to reinstatement was not per se a violation of federal due process.

The Loudermill decision is fully consistent with the Court of Appeals's decision in this case. First, the delay in this case was not justified by any need for a hearing to resolve factual or legal issues. As Petitioners acknowledge, under applicable law Petitioners periodically

issue certificates setting forth the amounts of SCRIE rents Petitioners are required to pay owners either through real estate tax credits or in cash (Pet. 3). Thus the amounts owing Respondent are not in dispute. What is in dispute is Petitioners' refusal to pay these amounts on a reasonable and timely basis. Instead, as a condition to payment, Petitioners compel property owners to file complicated applications, with extensive supporting documentation, that are both unnecessary and unreasonably burdensome.

Second, the length of the delay here is substantially more than the nine-month period in Loudermill. Petitioners understate the delay in collecting SCRIE rents by measuring it from May 1989 and May 1990, when Respondent filed applications for delinquent rents for calendar years 1988 and 1989, respectively (Pet. 13). However, the deprivation of rent and delay in payment commenced and should be computed from the time the rents accrued under Respondent's leases with SCRIE tenants, i.e. beginning on January 1, 1988 and January 1, 1989, respectively, for those years (App. 56, pars. 22-24). By this calculation, the delay was up to 30 months as to 1988 rents and up to 18 months as to 1989 rents when Petitioner commenced this proceeding in July 1990. What is more, Petitioners apparently intended to delay payment of the rents indefinitely (App. 55, pars. 14-15).

Finally, delay is not the only issue here. Respondent here alleges that Petitioners' procedures for paying SCRIE rents violate Respondent's federal due process rights. Petitioners completely ignore Respondent's objections to the unnecessary and burdensome application process, whereas Loudermill itself held that state

procedures are subject to compliance with minimum federal due process standards (470 U.S. at 541).

Petitioners seek dismissal of Respondent's due process claims regarding their SCRIE procedures before there is any evidentiary hearing as to the reasonableness of these procedures. Petitioners assert facts not in evidence and contrary to the Amended Complaint when they argue that delay in paying SCRIE rents is necessitated by Petitioners' thorough procedures (Pet. 13). The Court of Appeals rejected such summary process, holding that a factual investigation into Petitioners' procedures was needed to determine whether they comply with federal due process, citing Mathews v. Eldridge, 424 U.S. 319 (1976) (App. 22-27).

Petitioners further contend that their SCRIE procedures and the resulting abuses are like the random and unauthorized deprivations for which state court post-deprivation relief was deemed adequate in Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) (Pet. 9).

The abuses resulting from Petitioners' administration of the SCRIE Program, being grounded in official forms and procedures, are not random and unauthorized but officially-sanctioned conduct like that for which post-deprivation hearings were deemed inadequate in Zinermon v. Burch, 494 U.S. 113 (1990) (discussed Pet. 9-10), and precisely the established state conduct to which 42 U.S.C. Sec. 1983 applies. Indeed, Petitioners assert that the delay in paying Respondent was necessary so Petitioners could verify information in owner applications for SCRIE rents (Pet. 13). If that is so, then the

paperwork and delays to which Respondent objects are predictable and inherent in Petitioners' administrative processes. The Court of Appeals found Respondent's claims arose out of established state procedures, citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (App. 21).

Petitioners argue that they cannot provide pre-deprivation due process in administering the SCRIE Program (Pet. 10-11). Pre-deprivation due process is not only possible but necessary. Petitioners' refusal to provide adequate process for paying SCRIE rents compelled Respondent to bring this litigation. Rather than provide adequate process which would make litigation unnecessary, Petitioners ask this Court to recognize the right to bring state court litigation as a substitute for due process.

To have to bring judicial proceedings to collect acknowledged government debts compounds rather than redresses the offense to Respondent's due process rights. The right to bring legal proceedings is neither practical nor adequate protection against institutionalized government abuses for owners of small buildings with low government-regulated rents.

While making lengthy and elaborate arguments as to why there is no federal due process violation here, Petitioners admit, inconsistently, that Respondent may be entitled to damages if Petitioners' SCRIE procedures violate federal due process (Pet. 8, 11). Petitioners do not suggest, however, that property owners who have to bring legal proceedings to collect SCRIE rents are entitled to their legal expenses.

B. The Existence Of State Remedies Does Not Bar Federal Courts From Considering Federal Due Process Claims.

The District Court did not base its dismissal of Respondent's due process claims upon a finding that Petitioners' abuses were random and unauthorized but upon the ground that even if Respondent were deprived of a constitutionally-protected property interest, Respondent's only recourse was to state court because New York law provided sufficient remedies (App. 40-42).

The Court of Appeals rejected this limited recourse for violation of federal constitutional rights on the basis of Monroe v. Pape, 365 U.S. 167, 183 (1961) and Patsy v. Florida Board of Regents, 457 U.S. 496, 500-501 (1982), which permit aggrieved parties to sue in federal court for violation of federal constitutional rights notwithstanding the existence of state remedies (App. 20-21). These precedents make Petitioners' argument that Respondent has the option to pursue state court remedies irrelevant since none of the precedents cited by Petitioners in support of state court remedies (Pet. 11-12) preclude litigants with federal due process claims from pursuing them in federal court.

Finally, Petitioners attempt to overcome Respondent's right to federal court recourse by vastly overstating the significance of this case. Thus, Petitioners project from their mischaracterization of Respondent's claims as being based on delay alone a flood of federal court litigation based on dissimilar facts and legal issues brought under the "lure" of attorney fees authorized by 42 U.S.C. Sec. 1988. Indeed, Petitioners imply that it is appropriate to summarily dismiss cases brought under 42

U.S.C. Sec. 1983 as a way of limiting the federal court workload, denying litigants statutory attorneys' fees, and accommodating violations of federally-protected rights assumed to be necessitated by government budget cutbacks (Pet. 7-8).

CONCLUSION

It is clear under applicable authority that Respondent is entitled to federal court review of Respondent's due process claims with respect to the SCRIE Program. There is no conflict in authority on this point.

For these reasons, a writ of certiorari to review the decision of the Second Circuit Court of Appeals should not be granted.

Respectfully submitted,

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APPENDIX A

Fifth Amendment, U.S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

Fourteenth Amendment, Section 1, U.S. Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

United States Code,
Title 42, Section 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.